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A PATTERN-ORIENTED APPROACH TO FAIR USE

MICHAEL J. MADISON*

ABSTRACT

More than 150 years into development of the doctrine of "fair use" in American copyright law, there is no end to legislative, judicial, and academic efforts to rationalize the doctrine. Its codification in the 1976 Copyright Act appears to have contributed to its fragmentation, rather than to its coherence. As did much of copyright law, fair use originated as a judicially unacknowledged effort via the law to validate certain favored practices and patterns. In the main, it has continued to be applied as such, though too often courts mask their implicit validation of these patterns in the now-conventional "case-by-case" application of the statutory fair use "factors" to the defendant's use of the copyrighted work in question. A more explicit acknowledgment of the role of these patterns in fair use analysis would be consistent with fair use, copyright policy, and tradition. Importantly, such an acknowledgment would help to bridge the often difficult conceptual gap between fair use claims asserted by individual defendants and the social and cultural implications of accepting or rejecting those claims. In immediate terms, the approach should lead to a more consistent and predictable fair use jurisprudence. When viewed in light of recent research by cognitive psychologists and other social scientists on patterns and creativity, in broader terms, the approach should enhance the ability of copyright law to promote creative expression.

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INTRODUCTION

Ten years ago, the pop philosopher Robert Fulghum published a collection of brief essays in *All I Really Need To Know I Learned in Kindergarten*. In the first of those essays, he stated his credo: "ALL I REALLY NEED TO KNOW about how to live and what to do and how to be I learned in kindergarten. Wisdom was not at the top of the graduate-school mountain, but there in the sandpile ... [was one of] the things I learned: *Share everything*."¹ This Article uses Fulghum's simple statement as an entrée to one of the most intractable and complex problems in all of law: What is fair use?

Share everything. Surely this must be right, and surely it must have some purchase in our everyday lives as well as in our mythical childhoods. And in law? The idea that *sharing is good* finds expression in a variety of places in our legal system, often without controversy, typically as applied to tangible things. In the world of legal intangibles—the intellectual property world—claims of *sharing* lie at the bottom of particularly bitter contemporary disputes. The Internet has brought, among other things, *file sharing* systems, sometimes known as peer-to-peer networks,² which can be used to *share* (or swap, or worse) digital versions of copyrighted works on the Internet, bypassing traditional publishers and distributors. If *sharing is good*, the logic goes, use of these systems should be noninfringing under the Copyright Act, either because such use does not implicate the exclusive rights of the copyright holder,³ or because such use constitutes fair use.⁴

1. Robert Fulghum, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS* 6 (1993) (emphasis added). Like a lot of pop philosophy, Fulghum's book supports nearly any interpretation imaginable. For the purposes of this Article, it is merely a starting point.

2. From a popular standpoint, the best known of these programs was Napster's MusicShare software, which was the subject of the litigation recounted in Part I. See *infra* notes 23-27 (describing peer-to-peer networking).

3. The Copyright Act provides that the owner of a copyright has the exclusive rights to reproduce, distribute, publicly perform, and publicly display the copyrighted work, as well as the right to prepare derivative works. 17 U.S.C. § 106 (2000).

4. Fair use of a copyrighted work is "not an infringement." *Id.* § 107. Part II of this Article analyzes the text of this statute.

Copyright law, however, currently and endlessly tries to refute that logic, rightly pointing out that “sharing” is an empty concept when considered in isolation.⁵ Litigation by copyright owners brought against the suppliers of file sharing technologies and indirectly against end-users or consumers of those technologies has uniformly ended in victory for the plaintiffs and in defeat for the notion that “sharing” in this context constitutes fair use.⁶ It seems that neither authors nor their audiences are on the playground, presumably the locus of Fulghum’s precept.

Yet the ethics of sharing sometimes do apply in copyright, particularly in fair use. Fair use is, by design, a tool for permitting the

5. “Steal nothing,” the counterpart statement sometimes offered by publishing industries, is likewise meaningless when considered in isolation. Compare *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (quoting *Exodus* 20:15 (“Thou shalt not steal.”) to open the copyright opinion), with David Nimmer, *Thou Shalt Not Steal: A Canon of Construction of Title 17?*, in 27 *NEW MATTER* 1 (Intellectual Property Section of the State Bar of California, Spring 2002) (on file with author), and Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 867 n.183 (2001) (distinguishing unauthorized copying from theft, on economic grounds). But see John Seely Brown & Paul Duguid, *Stolen Knowledge*, in *SITUATED LEARNING PERSPECTIVES* 47-56 (Hilary McLellan ed., 1996) (using an Indian phrase to illustrate the importance of the listener or learner to the social practices of learning).

6. The relevant cases have not, as a rule, demanded relief against end users. Three cases have sought to enjoin distribution of file sharing computer programs based on claims of vicarious and/or contributory infringement. The plaintiffs succeeded in two of these cases. See *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The third, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), resulted in a finding of no liability for the defendant. The court based its ruling not on a finding of fair use by individual program users, but on the ground that the defendant lacked ongoing involvement in the operation of the file sharing system at issue, involvement that was arguably key to the result in *Napster*. See *id.* at 1041-46. The ruling in *Grokster* is on appeal before the Ninth Circuit. Two other pieces of related litigation have advanced related claims of copyright holders against file sharing technologies or cognates. See *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003) (denying motion to quash subpoena issued at request of copyright holder for discovery of identity of ISP subscriber engaged in file sharing), *rev’d*, *Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding that fair use did not shield defendant’s posting of digital copies of musical works on Internet servers for download by subscribers). The court in *Arista Records, Inc. v. MP3 Board, Inc.*, No. 00 Civ. 4660 (SHS), 2003 WL 21524529 (S.D.N.Y. July 3, 2003), granted final judgment in favor of third party defendant the Recording Industry Association of America, Inc. (RIAA) for claims the MP3 Board, Inc. brought against it alleging that RIAA wrongfully demanded MP3 Board to discontinue supposed infringing endeavors.

unauthorized sharing of works of creative expression.⁷ The difficulty in applying those ethics lies in the conceptual apparatus surrounding fair use, not in the idea of sharing itself. That apparatus, as it currently stands, is considerably less than robust.

When, and under what circumstances, should use of file sharing systems to reproduce and distribute copyrighted works be considered fair use under copyright law? At present, the law suggests that such use is never "fair" for copyright purposes.⁸ I assume that such an extreme position cannot be sustained with regard to all potential claims. But if such use of file sharing programs by a single pair of computer users might constitute fair use, when does equivalent use by a vast (or even unquantifiable) number of similar users cross the threshold into infringement? The law of fair use gives us neither an answer to this question nor a mechanism for producing an answer. The key to understanding fair use, I suggest, lies in identifying a framework for fair use analysis that connects the issue of individual use of copyrighted works to the issue of use of those works at a social level. In this Article, I characterize that framework as a "pattern-oriented" approach, because it asks whether an individual's use of a work without the consent of the copyright owner is consistent with a provable social or cultural pattern of conduct. That pattern should exist largely independent of the legal system itself and be adjacent to, but not ordinarily part of, the market economy. I suggest that such a pattern-oriented approach offers not only a method of analyzing cases involving file sharing on the Internet, but also a coherent method of analyzing fair use questions generally.

7. It is only one such tool supplied by copyright doctrine. Others, beyond the scope of this Article, include the distinction between idea and expression, *see* 17 U.S.C. § 102(b) (2000) (denying copyright protection to systems and methods); *Baker v. Selden*, 101 U.S. 99 (1879); Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1311 n.178 (2003); narrowing interpretations of the exclusive rights of the copyright holder, *see* 17 U.S.C. § 106 (2000); and the bounds of doctrines of secondary infringement. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (limiting application of doctrines of contributory and vicarious liability for copyright infringement).

8. This is the implication of *Napster*, *Aimster*, and *Grokster*. The reasoning of the two appellate courts is examined in more detail in Part I. The court in *Grokster* largely adopted the reasoning of the Ninth Circuit in *Napster* regarding the existence of direct infringement via use of the *Grokster* system and did not independently evaluate a possible fair use argument. *See Grokster*, 259 F. Supp. 2d at 1034-35.

The Article proceeds as follows. Part I introduces the fair use problem by summarizing litigation over file sharing computer technologies. In its most important sense, the problem described in this Article lies deeper than the Internet. Litigation over videotape recorders⁹ and photocopiers¹⁰ likewise questioned the fair use implications of unauthorized reproduction of copyrighted works occurring simultaneously at an individual level¹¹ and at a collective level of massive scale. Those earlier cases did not resolve the question, however, and its persistence exposes continuing flaws in fair use as a whole. Part II examines the text and meaning of the fair use statute, based both on instructions for its application provided by the Supreme Court and also on glosses offered over the years by copyright scholars. Part II concludes (not surprisingly) that neither the statutory text nor judicial or scholarly interpretation offers a stable framework for applying fair use either to file sharing problems or to copyright problems generally. Part III looks more closely at both historical and contemporary judicial decisions regarding fair use. Part III argues that judicial practice offers more hope for the doctrine than might be inferred merely from the text and commentary described in Part II. Though formally fact-specific, fair use decisions have in fact developed a sense of context that can be generalized as a framework for analysis across fair use as a whole.

Part IV revisits fair use doctrine in light of that conclusion, offering a reading that diverges from the conventional approach in that it does not situate fair use in the context of the appropriate limits of the use of a work of authorship. Rather, this reading situates fair use in the context of the confines of a relevant social or cultural pattern or practice.¹² The pattern-oriented approach introduced in this Part is based not on a conventional sense of finding patterns in the cases themselves,¹³ but in the different sense of relating the

9. *Sony Corp.*, 464 U.S. at 417.

10. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

11. It may be that the unauthorized reproduction on this level occurred innocently.

12. Classic examples of related approaches to connecting legal rules to context-based understandings of social patterns include ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) and Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

13. In copyright, one of the most straightforward examples of this approach has been situating a given claim that a defendant is vicariously liable for copyright infringement

content of the cases to the content of patterns existing in society outside the legal system. Part IV reviews relevant patterns, showing the extent to which fair use jurisprudence has been relatively untroubled as applied to more traditional, concrete patterns and rendered frustratingly abstract by arguments about the fairness of “decontextualized” use. My argument is not the first to note that the law of fair use has ignored its own history or relevant factual context.¹⁴ Nor is it the first to suggest that fair use should be comprehensively and systematically reexamined.¹⁵ It is, however, the first argument to place social practices at the heart of the doctrine. This Part suggests that the cases offer a pattern-oriented approach to fair use questions across the board, while remaining faithful to the text of the statute, an approach that is more reliable and predictable, if not always friendly to users of file sharing technologies, than current analysis.

Part V asks whether good reasons exist to adopt this framework prospectively, suggesting that the pattern-oriented approach to fair use decisions is not only consistent with both the statute and with fair use traditions, but also that it may be justified in the context of copyright policy. What good do patterns do?

At one level, social or cultural patterns may be characterized by sufficient internal behavioral homogeneity that, as an economic matter, permitting unrestricted use of copyrighted works by pattern-participants may be welfare-enhancing, rather than welfare-reducing. Moreover, the pattern-oriented approach observed in the case law is consistent with recent research in cognitive psychology and sociology that theorizes that relatively simple cognitive structures at the individual level, and relatively simple social and

between patterns defined by “the dance hall cases” (where the defendant has a sufficient economic interest in and supervisory authority over infringing performers to warrant liability) and the “landlord/tenant cases” (where both economic interest and authority are too attenuated). See Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1844-55 (2000).

14. See Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975 (2002); Ruth Okediji, *Givers, Takers and Others Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107 (2001).

15. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1678-82 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

cultural relationships, may be aggregated into complex patterns of activity. The products of these patterns are simultaneously difficult to predict with specificity and likely to produce novelty and creativity—the very sorts of end results that copyright policy, in a central sense, is designed to achieve. Without necessarily intending to do so, social and cultural patterns underlying case-by-case adjudication of fair use problems may have achieved something that formal reliance on the fair use statute has been unable to produce: a framework for analyzing fair use problems that is both stable and relatively predictable in the context of legal doctrine, and that corresponds in a sensible way to the behavior of individuals and institutions governed by copyright law.¹⁶ The Conclusion suggests how other problematic areas of contemporary copyright law may benefit from analysis using the pattern-oriented approach.

I. FAIR USE AND FILE SHARING

The idea that a “work” of authorship may be created, consumed, shared, and reproduced in the context of a social or cultural practice is an ancient one. Homer “shared” the contents of his epic poems with his listeners, and they in turn shared those epics with theirs, all in the context of accepted and well-understood traditions and patterns of oral learning.¹⁷ These traditions and patterns preserved these works and distributed them across both space and time. Law may regulate those practices, but practice necessarily informs law. In the context of privacy law and of the First Amendment, Robert Post has written that law does and should respond to social and cultural practices and patterns.¹⁸ “[A]ll legal values are rooted in the

16. The fact that such a framework is “messy” rather than clear in all cases is a necessary reflection of the culture that it addresses. See GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 463 (2000).

17. For a general discussion of the history and development of oral learning in this context, see ROSALIND THOMAS, *LITERACY AND ORALITY IN ANCIENT GREECE* (1992) and ROSALIND THOMAS, *ORAL TRADITION AND WRITTEN RECORD IN CLASSICAL ATHENS* (1989).

18. See, e.g., Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1272-73 (1995) [hereinafter Post, *Recuperating*]; Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); see also C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 744 (1986) (describing “property”

experiences associated with local and specific kinds of social practices.”¹⁹ Without belaboring possible doctrinal connections between copyright law and the First Amendment, Post’s argument, that “information” and expression do not exist in a vacuum and that their regulation must account for the social patterns in which they are embedded, is right, too, in the intellectual property context.²⁰ Whether use of file sharing technologies, for example, constitutes a legitimate use of copyrighted works can only be properly assessed against knowledge of the presence or absence of equivalent patterns. Yet debates about fair use seem to have lost that sense of context.

as a cultural creation); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (decrying law’s reliance on “platonic” pre-legal categories); Michael J. Madison, *Complexity and Copyright in Contradiction*, 18 CARDOZO ARTS & ENT. L.J. 125, 170-71 (2000) [hereinafter Madison, *Complexity*] (relying in part on institutional arguments in the context of First Amendment jurisprudence to argue for more contextual sensitivity in copyright generally); Daniel Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002) (analyzing privacy as a group of related social practices).

In pursuing this theme, I note the argument that our norms and preferences cannot be treated as completely exogenous to legal and other systems that, in part, produce them. See Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2038 (2001) (warning of technology-driven norm “feedback loops” that structure privacy norms); Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389, 414 (noting effect of law in shaping norms and values); Fisher, *supra* note 15, at 1733-39 (relating this argument to fair use); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998) [hereinafter Madison, *Legal-Ware*] (arguing that endogenous nature of fair use norms exposes fragility of the public domain); Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217, 235 (1993) (claiming inadequacy of social practices as normative justifications for rules that produce them). It is a simple matter to observe that law and social structures are mutually constitutive. The difficult task is to join both concepts, as well as the role of the individual, in a single analytic framework. See Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 517-32 (1998) [hereinafter Cohen, *Lochner in Cyberspace*]; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 992-93 (1995). For more analysis of the independent character of social patterns, see *infra* Part IV.A.

19. Post, *Recuperating*, *supra* note 18, at 1272.

20. Yochai Benkler makes a similar argument at a more abstract level than I pursue in this Article. Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000) (noting the potential of “horizontal” technologies to support different kinds of creative expression); see also Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1194-1204 (1999) (describing role of distributed computing power across the Internet in facilitating new and creative forms of social organization). Though this Article pursues the argument at a pragmatic level, the expressive dimensions of this phenomenon are relevant as well. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

Both copyright and its fair use doctrine once had that sense and, properly read, both still should have it.²¹ This Article examines how to investigate context and patterns of this sort and how to reconcile such an approach with the Copyright Act. This Part recounts judicial analysis of file sharing technologies to date in order to sharpen the Article's argument that the fair use doctrine can be redeemed using a pattern-oriented approach.

All copyright problems start with the existence of a work of authorship protected by copyright law.²² The copyright problem raised by file sharing computer technologies is that these technologies permit end-users to reproduce and distribute copyrighted works on a massive scale without the owner's permission. Consumer-oriented file sharing programs are part of a class of technologies known more precisely as "peer-to-peer" (P2P) networks, which enable participants in a network of digital electronic computers to transmit content directly and horizontally, that is, from "peer" computer to "peer" computer, rather than transmitting content hierarchically to, or retrieving content from, a higher-level "server" or host computer.²³ In practical terms, these technologies enable consumers of digitized copies of copyrighted products, such as songs, movies, books, video games, and computer programs, to exchange and/or acquire "copies"²⁴ of those products from one another, rather than

21. Lloyd Weinreb makes a related argument, but without suggesting an analytic framework, in Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1152-53 (1990) (suggesting that fair use cases should be decided according to community standards of fairness).

22. Copyright automatically attaches to each and every work of authorship fixed in a tangible medium of expression. 17 U.S.C. § 102(a) (2000).

23. See PEER-TO-PEER: HARNESSING THE POWER OF DISRUPTIVE TECHNOLOGIES (Andy Oram ed., 2001). For useful accounts of the technical evolution of P2P systems and their place in a theory of legal regulation, see LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 134-38 (2001); Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 726-45 (2003). The computer architecture of horizontal relationships that P2P systems enable is contrasted with the client/server architecture of the World Wide Web (among other systems), in which transmitting computer files from user (client) to user (client) requires the intermediate steps of uploading each file to a hierarchically distinct server, and downloading that file from that server.

24. Subtleties of both language and technology can be obstacles when discussing file sharing and copyright law. File sharing software is commonly referred to as both "file sharing" and "file-swapping" or "file-trading" software. Whether anything is improperly "shared," "swapped," or "traded" using a given P2P system is, of course, one of the very questions that the law is trying to assess. Copyright law forbids unauthorized reproduction or distribution

from a producer or distributor of those products. File sharing or P2P systems differ technically in many respects,²⁵ but these basic legal, technical, and practical dimensions are common to all.

Whether use of such systems to share copyrighted works is lawful is a question that begins with the story of a company known as Napster. In 1999, Napster released MusicShare, a free computer program for Internet users.²⁶ A copy of the MusicShare "client" program installed on the computer of an Internet user allowed that user to connect to computer servers operated by Napster, and (using that connection) to search for copies of copyrighted songs stored on the computers of other (connected) MusicShare users. Those searches facilitated "peer-to-peer" uploading and downloading of designated songs, in the digital MP3 file format, between MusicShare users.²⁷ The software was a runaway success.²⁸

of works in "copies." See 17 U.S.C. § 106(1), (3) (2000). A detail that requires that I qualify my description at this point with the disclaimer that I do not intend to opine as to whether translation of a song or movie from compact disc or videotape to a computer file constitutes making a "copy" of the copyrighted work. According to the Copyright Act, "[c]opies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (2000). Legally, are users who "share" copyrighted works engaged in unauthorized reproduction and distribution of copies of those works, where both uploading and downloading of the computer files involved, for all intents and purposes, mere intangibles? Presently, American law confirms that such users are in fact engaged in unauthorized reproduction and distribution of copies. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993). But see R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 126-35 (arguing that transmission of computer files does not involve a "distribution" of material objects within the meaning of the Copyright Act).

25. Some relevant differences are described below.

26. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

27. *Id.* MP3 is a digital file format for storing audio in compressed form, easy to send and receive using standard Internet protocols. It is a file extension for computer files using the Motion Picture Expert's Group-1 Audio Layer 3 (also known as MPEG-3 or MP3) algorithm for compressing digital files. At the time of the *Napster* litigation, MP3 files were the most popular format for converting music files recorded in another format medium into files small enough to be both playable using computer devices and transformable using relatively modest amounts of network resources. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.* 180 F.3d 1072, 1073-74 (9th Cir. 1999).

28. When entering a preliminary injunction, the district court relied on evidence that nearly seventy million copies of Napster's computer program had been downloaded from Napster's website and that nearly 10,000 music files were shared per second using the Napster system. *Napster*, 114 F. Supp. 2d at 902. See Peter Jan Honigsberg, Essay, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 474-75 (2002) (noting mass

In 2001, the Court of Appeals for the Ninth Circuit affirmed a preliminary injunction against Napster's operation of its system,²⁹ in large part on the ground that widespread use of the system by MusicShare users did not comport with any understanding of "personal" or "private" consumptive use of copyrighted songs and therefore constituted direct copyright infringement.³⁰ Napster's knowledge that MusicShare users were making and distributing unauthorized MP3 versions of copyrighted works amounted to vicarious and contributory copyright infringement.³¹ The injunction required that the company monitor its system aggressively in order to avoid unauthorized transmission of copyrighted works.³² The associated burden proved too great, and the injunction effectively killed the company.³³

Some specifics of the MusicShare technology are relevant to both the court's result and to the fair use analysis embedded within it. When installed on the computer of someone connected to the Internet and activated by that user via a connection to the Internet, the MusicShare program obtained an inventory of computer files in MP3 format stored in specified locations on the user's computer and copied that inventory to central computer servers maintained by Napster.³⁴ MusicShare further permitted the computer user, while logged on to Napster's computer servers, to search the inventories or directories of MP3 computer files of other MusicShare users si-

phenomenon aspects of Napster technology). Among some technologists, Napster has been viewed as something of a pop culture (and therefore not wholly respectable) phenomenon, taking not particularly complicated technical ideas and selling them to the masses. See Andy Oram, *Gnutella and Freenet Represent True Technological Innovation*, at <http://www.oreillynet.com/pub/a/network/2000/05/12/magazine/gnutella.html> (May 12, 2000) (criticizing Napster from a technical perspective).

29. *Napster*, 239 F.3d at 1011.

30. See *id.* at 1013-19.

31. See *id.* at 1019-24.

32. See *infra* note 56 and accompanying text (describing subsequent history of the *Napster* litigation).

33. The system was shut down in July 2001. See John Borland, *Napster Buyout Blocked: Fire Sale Likely*, at http://news.com.com/2100-1023_3-956382.html?tag=rm (Sept. 3, 2002). The company filed for bankruptcy protection in June 2002 and its assets were sold in November 2002. See John Borland, *Roxio Closes Napster Asset Buy*, at <http://news.com.com/2100-1023-975627.html> (Nov. 27, 2002). The service was relaunched in October 2003 as an authorized digital music downloading site. See John Borland, *Legal Napster Up and Running*, at <http://news.com.com/2100-1027-5099002.html> (Oct. 29, 2003).

34. This description of the technical underpinnings of the Napster system is derived from the account included in the court's opinion. See *Napster*, 239 F.3d at 1011-12.

multaneously logged on to that server.³⁵ MusicShare then enabled the first user's computer to download "copies"³⁶ of MP3 files selected by the user directly from the computer of another MusicShare user.³⁷ Each transmission of a given MP3 file, therefore, involved a simultaneous "download" of the file (by the requesting user, from the responding user) and "upload" of the file (by the responding user, from the requesting user). Besides developing and supplying the MusicShare software, Napster maintained the computer servers and related software to which each MusicShare user connected via the Internet.³⁸

Three aspects of this system have potential legal significance. First, before each upload/download transaction occurred, a given MP3 computer file was electronically present in the memory of the computer of only one of the two participants in the transaction.³⁹ When the transaction was consummated, that file remained resident in its original location, but an electronically identical file was now also present in the memory of the computer of the other participant. Colloquially speaking, the file was "reproduced" via operation of the Napster file sharing "system," a system consisting of MusicShare clients and the Napster server. Now located in the memories of two users' computers rather than one, the file by default remained available for download from either user's computer by other MusicShare users.⁴⁰ Second, although the file itself never passed through the Napster server, information about its origin and

35. See *id.* at 1012.

36. See *supra* note 24 (describing ambiguity of the term "copies").

37. See *Napster*, 239 F.3d at 1012. It is technically but not legally significant that all of this activity took place "on" the Internet, that is, using communication devices that exchange signals through the network of computer networks that comprises the Internet, but not "on" the World Wide Web. See F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 *RUTGERS COMPUTER & TECH. L.J.* 293, 297-98 (2001).

38. The MusicShare program also included functionality that permitted users to correspond with one another while logged in to the Napster system. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 907 (N.D. Cal. 2000). This feature was not at issue in the *Napster* litigation.

39. The file would ordinarily be stored in nonvolatile memory, or what computer users colloquially refer to as the computer's "hard drive."

40. Equally important, each user now had the ability to transfer the MP3 file to a recordable compact disc, a process known as "burning." If a MusicShare user received an MP3 file through the Napster system, then burned that MP3 file to a compact disc, in theory that file would now exist on two computer users' hard drives, as well as on the compact disc. See *Napster*, 114 F. Supp. 2d at 909.

destination locations did. The server itself brokered the introduction of one MusicShare client and user to another. Third, the identities of each MusicShare user and client computer remained technically unknown to all other MusicShare users and clients,⁴¹ as well as to Napster itself. Whatever the legal characterization of the conduct of MusicShare users, Napster contended that it had no knowledge of the character of their behavior on a transaction-by-transaction basis.⁴² Each MusicShare user could log on to the Napster system using a unique alphanumeric identifier of his or her own choosing. Each MusicShare user was identified to the Napster servers by that alphanumeric identifier and by a separate numeric identifier that corresponded to the user's actual computer. Functionally, operation of the Napster system was all but anonymous.⁴³

The plaintiffs in the case were nine record companies and music publishers—owners of copyrights to musical compositions and sound recordings that had been converted without their permission to MP3 format.⁴⁴ They sued Napster for vicarious and contributory copyright infringement, arguing that the company was responsible legally for the infringing activities of individuals who had downloaded and were using the MusicShare product on the grounds that Napster knowingly encouraged infringement by users and contributed significantly to their conduct,⁴⁵ or alternatively because Napster provided a facility for users' infringement, and profited as a result,⁴⁶ or both.

41. *See id.* at 905.

42. *See id.* at 902, 905.

43. *See Napster*, 239 F.3d at 1005.

44. How this conversion takes place is a matter generally beyond the scope of the *Napster* litigation itself, as is the question of whether MP3 versions of the plaintiffs' works constitute unauthorized reproductions, or unauthorized derivative works. In some cases, record companies or recording artists release MP3 or other digital recordings of these works. In many others, MP3 files are created by copying recordings from "traditional" music media—compact discs, cassette tapes, perhaps even vinyl recordings—onto recordable computer media. *See id.* at 1011. The process in general is colloquially known as "ripping," the software that is used to perform the process is known as "ripping" software, and the resulting MP3 files are known as "ripped" music or tracks. *See id.*

45. In other words, a claim of contributory liability for copyright infringement. *See id.* at 1019-22.

46. In other words, a claim of vicarious liability for copyright infringement. *See id.* at 1022-24.

In enjoining operation of the Napster system, the Ninth Circuit concluded that use of the system by individuals to "share" or "swap" unauthorized reproductions of musical recordings and compositions violated the Copyright Act.⁴⁷ Napster's defense, to the extent that it dealt with the behavior of MusicShare users themselves,⁴⁸ characterized users as merely innocent "consumers" of music.⁴⁹ Regardless of how consumers used the recordings found on (or through) the Napster "system," such use, they argued, was allegedly "personal" and/or "non-commercial."⁵⁰ Both defenses were based on *Sony Corp. of America v. Universal City Studios*,⁵¹ in which the Supreme Court held that the manufacturer of the Betamax video tape recorder (VTR) was not liable to producers of copyrighted television programming because the device was "capable of substantial noninfringing uses," a standard that the Court developed by drawing an analogy to legal standards governing cases alleging contributory infringement of patent rights.⁵² In *Sony*, the Court concluded that the VTR was a patent-like "staple item of commerce," in that it was frequently used for individual, noncommercial "time-shifting"—recording television programming with the consent of some copyright holders themselves, and otherwise legitimately as "fair use."⁵³ The Ninth Circuit refused to extend the arguable time-shifting privilege recognized by the Court in *Sony* to embrace so-called "space-shifting."⁵⁴

47. See *id.* at 1027.

48. Napster also raised a "safe harbor" defense based on the "service providers" provisions of the Digital Millennium Copyright Act (DMCA). See 17 U.S.C. § 512 (2000). The district court determined that Napster was unlikely to prevail on its DMCA defense, and the Ninth Circuit, while giving greater weight to possible application of the statute, agreed that there were serious questions regarding its application and that the balance of hardships tipped in favor of the plaintiffs. See *Napster*, 239 F.3d at 1025; *A & M Records, Inc. v. Napster, Inc.*, 54 U.S.P.Q.2d 1746 (N.D. Cal. 2000) (denying defendant's motion for summary adjudication of § 512 defense).

49. See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912-17 (N.D. Cal. 2000) (summarizing defenses emphasizing use of Napster technology for "sampling" of music and "space-shifting" music files).

50. See *id.* at 912.

51. 464 U.S. 417 (1984).

52. *Id.* at 442 (drawing analogy between copyright and "staple article of commerce" doctrine in patent law).

53. *Id.*

54. See *Napster*, 239 F.3d at 1019. *But see* Audio Home Recording Act of 1992, 17 U.S.C. § 1008 (2000) (providing that noncommercial uses of certain audio recording technology will not support liability for copyright infringement); *Recording Indus. Ass'n of Am. v. Diamond*

As operator of the system, Napster was held liable as a secondary infringer, accountable for knowing about and profiting from users' infringement, while having the technical ability to prevent it.⁵⁵

Since the MusicShare client and the Napster system in general were popularly referred to as "file sharing" technology from their inception, these facts and arguments framed the first judicial examination of an express claim that "sharing" is and should be permitted in copyright law. As the district court wrote in the first line of its opinion granting the plaintiffs' motion for preliminary injunction:⁵⁶ "The matter before the court concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings."⁵⁷ Although the injunction was granted and affirmed based on the vicarious and contributory liability claims against the company,⁵⁸ for present pur-

Multimedia Sys., 180 F.3d 1072, 1079 (9th Cir. 1999) (dicta recognizing space shifting as fair use in suit brought under Audio Home Recording Act). Napster's "space-shifting" claim is considered in more detail *infra* at notes 239-43 and accompanying text.

55. See *Napster*, 239 F.3d at 1019-24.

56. The district court entered an injunction preliminarily enjoining Napster from "engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner." *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000). The Ninth Circuit affirmed the district court as to Napster's liability, but ruled that the injunction was overbroad, and remanded the case to the district court. The lower court entered a revised, slightly narrower injunction. See *A & M Records, Inc. v. Napster, Inc.*, Nos. C 99-05183 MHP, C 00-1369 MHP, 2001 WL 227083 (N.D. Cal. Mar. 5, 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

57. *Napster*, 114 F. Supp. 2d at 900.

58. The court held that *Sony* applied only to the plaintiff's claims for contributory liability, see *Napster*, 239 F.3d at 1020-21, because it interpreted *Sony*'s "substantial noninfringing uses" standard as merely limiting the extent to which a defendant could be deemed to "know" of the infringement solely by virtue of selling a device capable of reproducing copyrighted works. Accordingly, with respect to those claims, Napster could be held liable "only to the extent that Napster: (1) receives reasonable knowledge of specific infringing files with copyrighted musical compositions and sound recordings; (2) knows or should know that such files are available on the Napster system; and (3) fails to act to prevent viral distribution of the works." *Id.* at 1027.

As to the contributory infringement claims, Napster could be held liable only if it had actual knowledge of infringement occurring via its system. With respect to the claims for vicarious infringement, the court ruled that *Sony* did not apply. See *id.* at 1022-23. The court further ruled that Napster could be liable "when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index." *Id.* at 1027. Although this conclusion might be read in context as suggesting that vicarious liability, too, required that Napster have actual knowledge of the infringement before it could be held to have the right and ability to control that infringement, the district court's revised

poses, the heart of the matter remains the defense that Napster users were themselves "sharing," (and not infringing) when they "shared," "swapped," or "traded" individual copyrighted musical works and sound recordings using the Napster system.

While the case seemed to present this question of "sharing," neither the court of appeals nor the district court truly addressed it.⁵⁹ The Ninth Circuit had little trouble establishing that users of the Napster system were engaged in direct infringement:

[P]laintiffs have shown that Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, § 106(1); and distribution, § 106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights [in their copyrighted musical works and sound recordings]. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.⁶⁰

The court cited no authority.⁶¹

injunction described the burden of identifying infringing computer files on Napster's system as "shared." The plaintiffs had to provide Napster with a list of infringing works and Napster had to implement a technical means of searching its system to block transactions in files that corresponded to those works even if the file titles did not literally correspond to those on the plaintiffs' list. Napster was liable for its users' infringement, in other words, if it failed to block infringing files after receiving "reasonable knowledge" of their existence. *See A & M Records, Inc.*, 2001 WL 227083, at *1, *aff'd*, *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

59. The fact that the decision in *Sony* was perceived by all parties in *Napster* and by the courts involved as central to the litigation ensured that the issues litigated were guided by the *Sony* framework for fair use, an analytic approach that reinforced the distinction between "personal" or "private" use and all other uses. Yet the popular and intuitive norm behind the Napster technology was its facility for enabling audience members (Napster users) to communicate works to one another, as well as communicate about works to one another—a facility reinforced rhetorically by the company with its selection of the "MusicShare" label for the client software. A "personal use" defense was thus suggested by *Sony* but rendered unlikely by the nature of the technology. At least one commentator has speculated that this reasoning lay behind Napster's decision not to contest the proposition that Napster users were engaging in direct infringement. *See* Niels Schaumann, *Copyright Infringement and Peer-to-Peer Technology*, 28 WM. MITCHELL L. REV. 1001, 1041-42 (2002).

60. *Napster*, 239 F.3d at 1014.

61. Such authority exists, though it remains controversial. As for the liability of Napster users who logged on to the Napster system and made files on their computers available for other users to download, see, for example, *Hotelling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (finding a library liable as an infringing "distributor"

The court then turned to the question of fair use of plaintiffs' works by users of the Napster system.⁶² The court concluded that the district court did not err in its judgment that the defendants had not satisfied their burden of showing that fair use precluded granting the plaintiffs the relief they sought.⁶³ Central to its conclusion regarding fair use were three aspects of the case: first, that the works involved (musical compositions and sound recordings) were not "transformed" in any way via processing by MusicShare clients;⁶⁴ second, that the scale on which the MusicShare client was deployed made use of the system effectively commercial, even though neither Napster nor MusicShare users paid or collected anything for either distribution of the software or sharing music files;⁶⁵ and third, this large-scale, nontransformative, commercial enterprise was operated anonymously with respect to virtually all individuals involved.⁶⁶ To the Ninth Circuit, Napster was effectively

when it makes an unauthorized copy of a work available to the borrowing public); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 551 (N.D. Tex. 1997) ("Webbworld 'distributed' PEI's copyrighted works by allowing its users to download and print copies of electronic image files."); *Playboy Enters. Inc. v. Frena*, 839 F. Supp. 1552, 1156 (M.D. Fla. 1993) (holding operator of an online bulletin board service liable for infringing distribution). But see Reese, *supra* note 23, at 126-35 (arguing that transmission of computer files does not involve a "distribution" of material objects within the meaning of the Copyright Act).

The liability of MusicShare users who downloaded files from other users is confirmed by *Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 101-02 (D.C. Cir. 1998). See also *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that a user makes a "copy" of software when it is loaded into the computer's RAM, or volatile memory). But see Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 550-52 (1997) (contesting whether a RAM copy of a computer program should be considered to be "fixed" for purposes of copyright law).

62. See *Napster*, 239 F.3d at 1014-19. Fair use is considered to be a mixed question of law and fact. This, coupled with the fact that the Ninth Circuit was reviewing an order granting a motion for a preliminary injunction, dictated the court's giving the district court a wide berth with respect to whether entry of the order under these circumstances was appropriate. Reversal was appropriate only if the district court committed a clear error of law.

63. Napster argued that the plaintiffs, in having requested a preliminary injunction, bore the burden of establishing each element of their case, including the conclusion that fair use did not apply. The court noted that the weight of authority was against Napster's argument, as fair use is typically pleaded and proved as an affirmative defense, but noted that resolution of the point did not affect its ultimate resolution of the case. See *id.* at 1014 n.3.

64. See *id.* at 1015. As discussed in more detail in Part IV.C.3, one key consideration for courts evaluating fair use claims is whether the work in question has been "transformed." See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (indicating that the central inquiry in evaluating fair use claims is the extent to which the new work is "transformative").

65. See *Napster*, 239 F.3d at 1015.

66. See *id.* Distinguishing authority that suggests that "personal" use of a work, alone or

operating a conventional (if virtual) marketplace for sales of copies of recorded musical compositions, cutting into the plaintiffs' sales of compact discs⁶⁷ and undermining the plaintiffs' potential for developing such a marketplace of their own.⁶⁸

The conclusion that Napster should be held liable for copyright infringement by its users is not an unreasonable one, but the court's formal analysis of the fair use question is unsatisfying.⁶⁹ The Ninth Circuit's approach asks first, whether the musical works and sound are undergoing any audible change, and second, whether they are the subjects of transactions that have the look and feel of commercial exchanges. These are not extraordinary questions. As I describe in more detail in Part III, they are entirely typical of contemporary fair use analysis. They are echoed in other, related litigation that either directly or indirectly analyzes fair use of musical works via file sharing systems or similar computer networks.

The Seventh Circuit, for instance, in *In re Aimster Copyright Litigation*,⁷⁰ applied Sony's "noninfringing uses" standard to the "Aimster" file sharing system by considering the possibility that Aimster might be used to exchange uncopyrighted material (avoiding the fair use question altogether) or genuinely to "space-shift" music actually owned by the system user (so that each copy of the

within a small circle of family members and acquaintances, is privileged, the district court concluded that, because of the anonymity of MusicShare users, such use could not fairly be characterized as "personal." See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912-13 (N.D. Cal. 2000). This "personal use" exemption, to the extent that it exists, can be supported either on the ground that such use does not unreasonably interfere with the legitimate economic expectations of the copyright owner (no loss exists), or on the ground that the circle of family and friends is bound by informal norms that limit onward redistribution of the work (the loss is limited and outweighed by the benefits associated with reinforcing intimate social networks). The district court's reasoning suggests reliance on the latter interpretation, though one wonders whether that reasoning would support a finding of "personal use" in any context where communications were sustained primarily through computers.

67. See *Napster*, 239 F.3d at 1016.

68. See *id.* at 1018-19.

69. Its analysis of the contributory and vicarious infringement problem is unsatisfying as well. See 2 PAUL GOLDSTEIN, COPYRIGHT § 6.1.2, at 6:12-1 (2d ed. 2003), cited in *In re Aimster Copyright Litigation*, 334 F.3d 643, 649 (7th Cir. 2003) (criticizing *Napster* for suggesting that Napster's knowledge of infringement was sufficient to demonstrate contributory liability); Stacey L. Dogan, *Infringement Once Removed: The Perils of Hyperlinking to Infringing Content*, 87 IOWA L. REV. 829, 873-78 (2002).

70. 334 F.3d 643 (7th Cir. 2003), cert. denied sub nom. *Deep v. Recording Indus. Ass'n of Am.*, 124 S. Ct. 1069 (2004).

work in effect remains virtually tethered to its owner, rather than entering a marketplace).⁷¹ No credible evidence suggested the probability of such uses, so the court affirmed an injunction restraining operation of the system.⁷²

In a proceeding to quash subpoenas issued under the Digital Millennium Copyright Act⁷³ seeking disclosure of the identity of an individual suspected of illegally sharing MP3 files via Verizon's Internet service, the district court in *In re Verizon Internet Services, Inc.*⁷⁴ dismissed concerns that enforcement of the subpoena would tend to diminish the individual's interest in fair use, and it enforced the subpoenas.⁷⁵

In *UMG Recordings v. MP3.com, Inc.*,⁷⁶ decided before *Napster*, the district court entered a judgment of direct copyright infringement against a company that, via its "My.MP3.com" service, distributed MP3 files of musical works via the Internet to individuals who supplied nominal evidence to the distributor that they already owned copies of those works. The court held that the company's activities did not amount to fair use of those works. The company's fair use claim was deemed "indefensible," the equivalent of "a bald claim that defendant should be able to misappropriate plaintiffs' property simply because there is a consumer demand for it."⁷⁷

What is missing in these analyses is missing more broadly from the law of fair use as a whole—a concern not merely with works of authorship themselves, but with the manner in which those works are used. The court in *Napster* concluded that individual use of the Napster system was irrelevant. What counted was the massive, anonymous scale of unauthorized transmissions. The court in *Aimster* devoted less time than the *Napster* court did to its fair use analysis, but it did contemplate briefly how the Aimster system was

71. See *id.* at 652-53.

72. See *id.* at 653-56.

73. 17 U.S.C. § 512(h) (2000).

74. 257 F. Supp. 2d 244 (D.D.C. 2003).

75. See *id.* at 262-64 (noting that any First Amendment concerns, including those predicated on fair use, were built into the design of the subpoena authority granted by § 512(h)). The Court of Appeals for the District of Columbia Circuit later reversed the orders enforcing the subpoenas on the ground that they were not authorized by the statute. See *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

76. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

77. *Id.* at 352.

being used. The court noted the possibility the Aimster system might accommodate both large-scale infringing use and genuine noninfringing use. Rather than resolve tension between the two possibilities, the court concluded that the evidence was not sufficient to demonstrate that the latter was significant.⁷⁸ The story of file sharing systems, and thus the story of fair use, is incomplete in this focus on the work at the expense of its context.

On the Internet, and with a little analysis, everything is "personal" and everything is "commercial." By separating the intellectual content of creative works of authorship from any necessary physical instantiation, (i.e., copyrighted works can multiply across the Internet and be enjoyed by millions without ever being printed out or burned to a compact disc or DVD),⁷⁹ the Internet explodes the limited ability that the current form of fair use possesses to sustain these gradations. Every copyright-implicated use of the Internet seems to be fair, or, as the cases involving online *sharing* currently teach, none is. The availability of the fair use doctrine as a means to sustain meaningful distinctions between legitimate and illegal uses of copyrighted material needs to be revived, in a way that is true to the history of the doctrine and copyright policy. Assessments of the fair use doctrine in the digital context have focused, as have the courts themselves, on the economic character of the works being made available without producer controls on the Internet.⁸⁰ But

78. See *Aimster*, 334 F.3d at 652-53.

79. See Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275 (2003) (describing copyright complications of works of authorship not embodied in genuine tangible media).

80. See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (characterizing the distinction between "complementary" and "substitutional" uses as "orthodox" in fair use economics). Some of the more interesting of these analyses include Michael W. Carroll, *Disruptive Technology and Common Law Lawmaking: A Brief Analysis of A & M Records, Inc. v. Napster, Inc.*, 9 VILL. SPORTS & ENT. L.J. 5 (2002); Stacy L. Dogan, *Is Napster a VCR? The Implications of Sony for Napster and Other Internet Technologies*, 52 HASTINGS L.J. 939 (2001); Michael A. Einhorn, *Copyright, Prevention, and Rational Governance: File Sharing and Napster*, 24 COLUM.-VLA J.L. & ARTS 449 (2001); Shubha Ghosh, *Turning Gray into Green: Some Comments on Napster*, 23 HASTINGS COMM. & ENT. L.J. 563 (2001); Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001); Honigsberg, *supra* note 28; Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539 (2003) [hereinafter Ku, *Consumers*]; Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) [hereinafter Ku, *Creative Destruction*]; David G. Post, *His Napster's Voice*, 20 TEMP. ENVTL. L. & TECH. J. 35 (2001); Schaumann, *supra* note 59; Alfred C. Yen, *A Preliminary Economic Analysis of*

proceeding on this basis, even enjoining the operation of Napster, has done little to slow the growth of technologies that enable distribution of digitized copyrighted works without authorization from their owners.⁸¹

Litigation over file sharing systems is likely to continue. Copyright plaintiffs are beginning to strategize lawsuits filed directly against users of such systems,⁸² suggesting that a confrontation is likely between competing constructions of fair use, unmediated by arguments regarding the character of secondary liability for copyright infringement. But the problem with fair use lies deeper than with the implications of new technology for "personal use." Courts and commentators have failed to deploy fair use as an affirmative expression of copyright policy. The core of copyright policy is the constitutional mandate that copyright law serve the interests of "Progress."⁸³ The Supreme Court teaches that in twentieth (and now twenty-first) century terms, "Progress" is measured by the creativity that the mechanisms of copyright induce, both via its original production function,⁸⁴ via fair use,⁸⁵ and via other

Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining, 26 U. DAYTON L. REV. 247 (2001).

81. It is unclear whether the injunctions against Napster and Aimster, and litigation against Grokster, has measurably diminished the scale of use of other unauthorized file sharing systems. See Mary Madden & Amanda Lenhart, *Pew Internet Project Data Memo* (July 2003), available at http://www.pewinternet.org/reports/pdfs/PIP_Copyright_Memo.pdf (reporting results of survey suggesting widespread popular disregard for copyright interests implicated in file sharing systems for music); Lee Rainie et al., *Pew Internet Project and Comscore Media Metrix Data Memo* (Jan. 2004), available at http://www.pewinternet.org/reports/pdfs/PIP_File_Swapping_Memo_0104.pdf (reporting results of survey suggesting decrease in use of file sharing computer software).

82. In *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), an Internet Service Provider (ISP) avoided compliance with a subpoena served by the Recording Industry Association of America seeking the identity of ISP subscribers suspected of illegal file sharing, on the ground that the Digital Millennium Copyright Act did not authorize service of such subpoenas in the absence of a predicate law suit. Even before this case was decided, the recording industry had initiated lawsuits directly against individual users of unauthorized file sharing services. See Amy Harmon, *The Price of Music: The Overview*; 261 *Lawsuits Filed on Music Sharing*, N.Y. Times, Sept. 9, 2003, at A1. Since the decision, the pace of filings has increased. See John Schwartz, *Music Industry Returns to Court, Altering Tactics On File Sharing*, N.Y. TIMES, Jan. 22, 2004, at C1.

83. U.S. CONST. art. I, § 8, cl. 8 (defining "Progress" as the measure of congressional authority in copyright and patent matters).

84. See, e.g., *Quality King Distribs. v. Lanza Research Int'l, Inc.*, 523 U.S. 135, 151 (1998).

85. Famously, but unhelpfully, copyright is described as implementing a balance between the incentives provided by the exclusive rights granted the author of a copyrighted work and

means.⁸⁶ As the Court noted in *Campbell v. Acuff-Rose Music, Inc.*,⁸⁷ “[t]he fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”⁸⁸ An uncritical and acontextual focus on the work of authorship as such, at least in the context of fair use,⁸⁹ fails to articulate any credible connection between copyright doctrine and production of creative works of authorship.⁹⁰

Understanding fair use as a flexible tool to promote creativity is thus, without more, too broad a perspective to be meaningful in practice. One common contemporary refinement, based on a focus on the work of authorship, argues that the scope of fair use is defined either by the scope of the plaintiff’s economic interest in exploiting the work, or by the level of production and distribution incentives needed by plaintiffs and similarly situated authors and publishers. As I note in the next Part, and as others have argued at much greater length,⁹¹ both economic arguments are incomplete measures of the copyright system. If the promotion of creative expression is determined by maximizing either the returns of authors and publishers, or their financial incentives, at the extremes (all markets, or no markets) there is either no room whatsoever for fair use (since it interrupts the copyright owner’s profit flow) or no room whatsoever for copyright in the first place (since any copyright-based limits on an author’s ability freely to access and reuse existing materials would depress that author’s incentive to produce new works).⁹² A system of either sort is conceptually feasi-

the value of access afforded the consumers of that work. See *Stewart v. Abend*, 495 U.S. 207, 228 (1990).

86. See *supra* note 7 (noting other limiting doctrines in copyright).

87. 510 U.S. 569 (1994).

88. *Id.* at 577 (alteration in original) (quoting *Stewart*, 495 U.S. at 236).

89. And perhaps more broadly in copyright. See discussion *infra* Part IV.B (describing possible relevance of pattern-oriented analysis to additional copyright problems).

90. In a similar vein, Michael Birnhack argues that appeals to the interests of “users” in fair use and elsewhere must articulate both descriptive and normative connections to constitutional “Progress.” See Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3 (2001).

91. See Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000) [hereinafter Cohen, *Perfect Curve*]; Cohen, *Lochner in Cyberspace*, *supra* note 18; Lunney, *supra* note 14.

92. Judge Richard Posner argued in a recent opinion that the economic argument is

ble⁹³ but neither pragmatic nor, more importantly, desirable. It is far from clear that a system designed exclusively to assure financial rewards to authors and publishers will encourage them to behave creatively rather than (or in addition to) selfishly. Anecdotal evidence strongly suggests that authors and publishers of a variety of types of information works will work exhaustively to limit uncompensated uses of those works, whether or not those efforts are socially valuable.⁹⁴ And it is also likely, as this Article argues, that we can stimulate much of the creativity we want by looking to structured—but non-market-based—social processes.

II. THE FAIR USE STATUTE AND ITS INTERPRETATIONS

This Part describes possible sources of a coherent and positive account of fair use—the statutory language itself, scholarly efforts to theorize fair use and copyright, and judicial interpretations of the statute. It concludes that twenty-five years after the doctrine was codified in the Copyright Act of 1976, courts are no closer to a meaningful understanding of the doctrine than Congress appeared to be at the time of the law's enactment. Experienced copyright scholars will be familiar with much of this material and may wish to skip ahead to Part III.

consistent with a comprehensive model of fair use that endorses “complementary” uses (such as criticism) as “fair” and rejects “substitutional” uses (such as selling unauthorized reproductions) as unfair. See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002). The model is less comprehensive than it appears, however, since it raises the prior question of determining the character of the copyright owner's legitimate market. The Supreme Court has said that fair use means, among other things, that the copyright owner's judgment regarding economic harms caused by unauthorized use ought not to be always trusted. See *Campbell*, 510 U.S. at 598.

93. The foundations of copyright are sufficiently contested that thought experiments of this sort are not incredible. See, e.g., David Lange, *A Comment on New York Times v. Tasini*, 53 CASE W. RES. L. REV. 653 (2003) (imagining a world without copyright law); Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us To Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997) (imagining a technological world in which digital rights management technology allows all uses to be priced).

94. See Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433 (2003) (describing information producers' reliance on statutory and common law strategies); Madison, *Legal-Ware*, *supra* note 18, at 1077-92 (describing norm-reinforcing effects of shrinkwrap and clickwrap licensing); Lunney, *supra* note 14 (describing effects of market-oriented fair use framework).

A. Conflicts and Complications in the Statutory Text

Any positive framework for fair use must begin with the language of the statute:

Notwithstanding the provisions of sections 106 and 106A [which define infringement of a copyright], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁹⁵

This section was added to the Copyright Act as part of the wholesale statutory revision that was enacted in 1976 and took effect in 1978.⁹⁶ Prior to that time, fair use was a well-recognized element of copyright jurisprudence (dating, by most accounts, from the mid-1800s),⁹⁷ but it was entirely nonstatutory. In fact, during the lengthy negotiations that preceded enactment of the new statute, most of the discussion of fair use focused on whether it should be

95. 17 U.S.C. § 107 (2000).

96. Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-118 (2000)).

97. See *Campbell*, 510 U.S. at 575-76; WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 1-63 (2d ed. 1995) (summarizing history of "fair use" in copyright); Okediji, *supra* note 14, at 118-37.

codified at all or instead left to continued judicial development.⁹⁸ Arguments in favor of codification prevailed, but on terms that, upon an initial reading, have suggested to most judges and scholars that Congress intended to leave the substance of the doctrine undisturbed.⁹⁹ Among other things, the text of the statute reviews the primary kinds of cases in which the fair use doctrine typically had been invoked, and it lists the “factors” upon which courts deciding fair use questions had most commonly and historically relied. The House Report that accompanied that final bill noted that Congress intended not that the “fair use” doctrine be applied categorically, but rather that cases raising fair use questions be decided on a “case-by-case” basis.¹⁰⁰

The apparent innocence of this mostly standard account belies the interpretive demons that it conceals, even beyond the accepted admonition that fair use is notoriously fact-specific.¹⁰¹ It is clear that the statutory text offers far less than it appears to.

1. “Notwithstanding the provisions of Sections 106 and 106A, the fair use of a copyrighted work ... is not an infringement of copyright.”

The first and most obvious problem with the statute appears in its opening line. The “fair use” of a copyrighted work is not an infringement. A “use,” therefore, might be fair or unfair, but what is a “use?” Nowhere in the Copyright Act is this term defined, and nothing in §§ 106 or 106A, which define the scope of infringement liability, depends on the term “use.” Infringement liability depends on unauthorized “reproduction,” “distribution,” “display,” and “performance,” among other things.¹⁰² The predecessor to the current Copyright Act, the Copyright Act of 1909, defined infringement in terms of unauthorized printing, reprinting, copying, and vending the copyrighted work.¹⁰³ The original American copyright statute,

98. See PATRY, *supra* note 97, at 261-366.

99. Codification of the principle was designed to assure more reliable application of equity in copyright. See H.R. REP. NO. 94-1476, at 65-66 (1976); *infra* notes 326-40 and accompanying text.

100. H.R. REP. NO. 94-1476, at 66.

101. See *Campbell*, 510 U.S. at 577-78.

102. See 17 U.S.C. § 106 (2000).

103. See Copyright Act of 1909, Pub. L. No. 349, 35 Stat. 1075 (1909).

enacted in 1790 and in effect when the modern form of fair use began to take judicial form in the mid-1800s, spoke in terms of unauthorized "printing, reprinting, publishing and vending."¹⁰⁴ One might logically conclude that the fair use doctrine is simply coextensive with the scope of infringement liability (printing, reprinting, publishing, and vending might be infringing, or it might be fair, for example), but the differing terminology suggests something more. The distinction between copyright infringement and fair use is not a binary "either/or."¹⁰⁵

The second problem is that this phrase carves out an exception to what otherwise would constitute liability for infringement. "Fair use" is *not* infringement of a copyright. The most plausible reading of this text, therefore, is that the plaintiff in this case must prove that the defendant's "use" is not a fair use. Yet courts have concluded almost universally that the burden of proof with respect to an allegation of fair use lies with the defendant.¹⁰⁶ The statutory text leaves us with a debate about whether fair use constitutes a "right" of the copyright consumer/new author (an argument sometimes enhanced by resort to counterpart "information" interests under the First Amendment) or merely a "privilege" to be exercised only in relatively rare cases.¹⁰⁷

2. *"including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"*¹⁰⁸

This portion of the statute is referred to as the "preamble," and its relevance to fair use jurisprudence has been unclear since the codification of fair use. The list of "uses" provided in the preamble might be applied to any given dispute in several different ways: as a sum-

104. See Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

105. See Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003) (describing different conceptions of how consumers might engage copyrighted works, and the extent to which those conceptions do or should trigger infringement liability).

106. See *Campbell*, 510 U.S. at 590.

107. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 n.3 (11th Cir. 2001) (dicta expressing support for the argument that fair use ought to be considered a right of the consumer or new user).

108. 17 U.S.C. § 107 (2000).

mary of the four factors that follow¹⁰⁹ and therefore redundant of them; as a guide for application of the four factors; as illustrative of the first of those factors, which focuses on the purpose and character of the “use;” as additional factors whose presence might tip the scales in favor of “fairness” and whose absence might suggest infringing use; as uses that are presumptively fair, in which case the fair use claim could be rebutted under the four factors that follow; or as a statutory list to which one or more canons of statutory construction should apply, limiting or merely illustrating kinds of “fair” uses.¹¹⁰

The legislative history of the statute speaks in different directions. The 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*,¹¹¹ prepared as part of the comprehensive investigation of copyright that preceded the 1976 revision, characterized the judicial form of fair use as meaning “that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner’s market for his work.”¹¹² The House Report that accompanied the final bill fifteen years later relied on a different portion of the Register’s Report, which provided a list of examples of kinds of uses that fair use had recognized:

quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quo-

109. See discussion *infra* Part II.A.4-7.

110. As is typical with the canons, there are competitors. One might look to “*expressio unius est exclusio alterius*,” defined as “[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S LAW DICTIONARY 602 (7th ed. 1999). Alternatively, one might rely on “*ejusdem generis*,” the principle that a list of examples be interpreted in light of the terms that precede it. See *id.* at 535. For a list of the canons used by the Supreme Court, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97-108 (1994).

111. REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961), reprinted in 2 ARTHUR FISHER, STUDIES ON COPYRIGHT 1199 (1963) [hereinafter 1961 REPORT].

112. *Id.* at 24. The 1961 Report goes on to characterize prior law as rendering “often the most decisive” the competitive character of the use, now embedded in the first and fourth fair use factors. *Id.* at 25.

tations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.¹¹³

A comparable list appears in the statute. The fact that the list is self-evidently illustrative rather than exhaustive¹¹⁴ indicates that an infringement may be excused as "fair" even if it amounts to a use that does not appear on the list.¹¹⁵

The Supreme Court has stated that the uses listed in the preamble are plainly but merely illustrative and that fair use adjudication should be based on "case-by-case" examination of the four factors.¹¹⁶ Perhaps more than any other, this theme lies at the heart of statutory analysis of fair use.¹¹⁷ The Court has rejected the claim that the theme of "productive use" unifies the uses listed in the preamble, and the argument that a use is fair only if it is deemed "productive" rather than "consumptive."¹¹⁸ On the other hand, the Court also has

113. H.R. REP. NO. 94-1476, at 65 (1976) (quoting 1961 REPORT, *supra* note 111, at 24). The 1961 Report constructed its review of the history of fair use by first listing examples of types of fair uses that, *in general*, had been considered fair and not infringing. It then provided a list of factors that, the Report argued, typically were used by courts *in specific cases* to decide whether a particular defendant had infringed. 1961 REPORT, *supra* note 111, at 24-25. The House Report that accompanied the bill repeats the same format, quoting the list of examples from the 1961 Report, then listing the four factors proposed for what is now § 107, and explaining, "These criteria are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case" H.R. REP. NO. 94-1476, at 65.

114. See 17 U.S.C. § 101 (2000) (stating that "[t]he terms 'including' and 'such as' are illustrative and not limitative").

115. See, e.g., *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1494-95 (11th Cir. 1984).

116. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (rejecting the argument that *Harper & Row* created a presumption of unfairness if the defendant's use was commercial); see also William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 674-76 (1993) (concluding that giving presumptive weight to the preamble overvalues its influence in the context of the statute as a whole).

117. See *Campbell*, 510 U.S. at 577; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552, 560 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49 n.31 (1984).

118. See, e.g., *Sony Corp.*, 464 U.S. at 477-81 (Blackmun, J., dissenting) (arguing that VTR use ought to be considered not "productive" and therefore not fair); LEON E. SELTZER,

indicated that the uses listed in the preamble are relevant only to the first factor, rather than to the statute as a whole. "The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like"¹¹⁹

3. *"In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include"*¹²⁰

The word "shall" suggests that a court reviewing a fair use claim ought always to examine all four factors that follow, but courts dispose of fair use claims without explicitly reviewing each of them.¹²¹ "Include" is defined in the statute to mean what it appears to mean—other factors may, but need not, be considered.¹²²

Yet the statute does not suggest any other relevant factors. Nor does it suggest how to discern them. And it does not tell courts how to compute a fair use determination based on the factors on which the court does rely. Some courts have relied on the "good faith" of the accused infringer, as a catchall factor justified by the historical sense that fair use is an "equitable" doctrine.¹²³ Even apart from the notorious difficulties associated with measuring good faith in any context, why the "good faith" of the infringer should matter here is unclear. To the extent that copyright policy is informed by a utilitarian calculus maximizing social welfare in terms of "creativity" and

EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978). Given dissatisfaction with the Court's more recent endorsement of a "transformative use" standard for the first factor, arguments in support of a "productive use" standard have reappeared. See, e.g., Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1, 31-32 (1997); Okediji, *supra* note 14, at 174.

119. *Campbell*, 510 U.S. at 578-79.

120. 17 U.S.C. § 107 (2000).

121. See *Bond v. Blum*, 317 F.3d 385, 392 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 103 (2003) (noting plaintiff's argument that district court erred by failing expressly to give adequate consideration to each of the four factors); see also *Educ. Testing Serv. v. Stanley H. Kaplan, Educ. Ctr., Ltd.*, 965 F. Supp. 731, 736 (D. Md. 1997) (dispensing with a factor-by-factor analysis of fair use and relying on the "broader perspective" of alleged unfairness of copying).

122. See *supra* notes 113-14 and accompanying text.

123. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551 (1985); *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986). But see *PATRY*, *supra* note 97, at 3-6 (distinguishing the equitable sense of fair use as "fairness" from the historical connection between "equity" and English equity courts).

"creative" works of authorship,¹²⁴ the question ought not to be whether the defendant believed that he or she was acting legitimately, but whether the outcome of the defendant's efforts was more socially valuable than the outcome produced by allowing the copyright holder to enjoin the use or obtain payment.

The other unlisted factor to receive significant judicial attention is whether the copyrighted work at issue has been published, according to copyright law's definition of that concept.¹²⁵ Prior to the 1976 revision, unpublished works were protected by statutory copyright only under limited circumstances;¹²⁶ by definition, therefore, most of the time there was no ground to consider "fair use" as a defense to infringement of an unpublished work. The revision brought unpublished works within the scope of statutory copyright, thus raising the fair use question. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹²⁷ the Supreme Court found that the unpublished nature of the plaintiff's work weighed against the defendant's claim of fair use.¹²⁸ The Court claimed a statutory basis for its ruling in the second fair use factor, the nature of the copyrighted work, but a better explanation of its reasoning is that the Court was filling in a new factor for a situation not anticipated at the time of drafting.¹²⁹ Congress modified the statute partly to reverse the Court's stan-

124. The incentive function of copyright law is settled law, and I do not challenge its normative basis. See discussion *infra* Part V.A. More generally, however, the normative underpinnings of copyright doctrine remain unsettled as a conceptual matter. See Garon, *supra* note 7, at 1278.

125. See *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214-15 (11th Cir. 1999).

126. Prior to the 1976 revision, statutory copyright encompassed creative works that were published and accompanied by an appropriate copyright notice. (Certain unpublished works might obtain federal copyright protection by being registered with the Copyright Office.) As part of that revision, the rule limiting copyright's scope to published works was dropped. Since 1978, under American law copyright has attached automatically to all works of authorship fixed in a tangible medium of expression. See 17 U.S.C. § 102(a) (2000).

127. 471 U.S. 539 (1985).

128. *Id.* at 554.

129. The nature of the copyrighted work, in fair use terms, typically suggests some inquiry into the character of the creativity that defines it as a work protected by copyright. Technically, whether a work has been published or not involves an inquiry into distribution not just of the work (the intangible protected by copyright), but of copies of the work (the tangible instantiations of the work). Moreover, reading "unpublished" into the considerations made relevant by this factor seems inconsistent with the intent of Congress, because prior to 1978 an unpublished work could not, with minor exceptions, be the subject of an infringement action in the first place.

dard. An unpublished work now may be reproduced under color of a valid fair use defense.¹³⁰ But the fact that a work is unpublished remains a factor weighing against fair use.¹³¹

4. “(1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*”

Courts and scholars trace delineation of the four factors to Justice Story’s seminal fair use opinion in *Folsom v. Marsh*.¹³² The fact that the factors have a distinguished pedigree, however, has not spared courts significant confusion in their modern interpretation.

“The purpose and character of the use” suggests either one inquiry (purpose and character being synonymous) or two (purpose being one question, character being the second). One might suppose that the “purpose” of the use is the category into which the use allegedly falls, such as research, teaching, or criticism. The “character” of the use might be the extent to which the use is consistent with the claimed purpose. A critic’s quotation of the entire second act of a three-act play would use the play for a critical “purpose,” but the “character” of the critical use would be excessive and therefore infringing. To most courts, parsing the language of the statute in this way seems excessive; they typically quote and invoke “purpose and character” as a single criterion. To the extent that “character” is given independent significance, courts relate the term to the possibility that the defendant did not act in “good faith.”

The second phrase (“including whether such use is of a commercial nature or is for nonprofit educational purposes”) is similarly opaque. The term “including” again requires that the phrase be interpreted as a nonexclusive limitation, but the opposing of “commercial nature” and “nonprofit educational purposes” is misleading. It suggests that these phrases oppose one another (though “commer-

130. Congress was petitioned to clarify the statute, which it did in 1992. Section 107 now states: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above [four] factors.” 17 U.S.C. § 107 (2000); see *Bond v. Blum*, 317 F.3d 386, 395-96 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 103 (2003) (finding that defendant made fair use of unpublished manuscript).

131. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003).

132. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). For a discussion of *Folsom*, see *infra* Part III.A.

cial" likely opposes "noncommercial," and "nonprofit educational purposes" opposes several things, including for-profit educational purposes and nonprofit, noneducational purposes). It also suggests that these two concepts define the scope of the kinds of "purposes" and "characters" to which the first factor applies. Even under the most limited reading of the preamble, the preamble's list of likely "fair" uses describes a universe of possibilities that is broader than those provided here.

One answer to this conundrum comes from the give-and-take of the negotiating that led to the statute. A factor defined only by "purpose and character of the use" would have sufficed to restate the point of the law at the time; the references following the commas were inserted at the request of certain copyright-holding ("commercial nature") and certain copyright-using ("nonprofit educational purposes") interests.¹³³ But the origin of the language begs the question of what it means within the context of this factor alone, and more importantly of what the language means in the context of the balance of the statute. The notions that commercial infringement is less likely to be fair, and that nonprofit educational infringement is more likely to be fair, were plausible to Congress because they came from somewhere in the history of the law.

Equally problematic are distinctions that courts have drawn under color of this factor between "commercial" and "noncommercial" use,¹³⁴ between "transformative" and non-"transformative" use,¹³⁵ and between "productive" and non-"productive" use.¹³⁶ What precisely each of these distinctions means is uncertain. Use by a for-profit enterprise (such as a newspaper) may nonetheless be not "commercial," and infringing "commercial" use may exist, as in *Napster*, where not-for-profit users infringe copyrights in order to avoid having to pay to acquire copies of a copyrighted work. "Transformative" use is more likely to be fair, but virtually any nonreplicative use in some sense "transforms" the original work, and the point on the "transformation" scale where this factor begins

133. See PATRY, *supra* note 97, at 320-63, 433-34.

134. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450-51 (1984).

135. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

136. See *supra* note 118 and accompanying text.

to favor the defendant is unknown.¹³⁷ Moreover, the extent to which any of these distinctions is currently operative under the fair use doctrine is open to doubt. The Court offered the “commercial” versus “noncommercial” distinction in *Sony* and *Harper & Row*, then retreated from that argument in *Campbell*, but perhaps only in part.¹³⁸ Sony rejected a “productive” use standard for fair use as a whole; *Campbell* introduced the idea of the favored “transformative” use under the first factor.

In *Napster* the court suggested that anonymous use might count against a defendant under this factor, at least in cases where the defendant argued that making the work available to someone else (whether or not named as a defendant, or even identified) is excused as fair use.¹³⁹ The fact that the second person is known to the first makes the contact legitimate, perhaps as a form of “personal use,” which the Court appeared to endorse in *Sony* when it accepted off-the-air videotaping of television broadcasts for “time-shifting” purposes as fair.¹⁴⁰ It is difficult to see a basis in the statute or its legislative history for this distinction, unless it could be argued that the anonymous “character” of the use is in some way inconsistent with a nominally legitimate “purpose.”

5. “(2) the nature of the copyrighted work;”

The Court has stated that the scope of the fair use defense varies with the degree of creativity inherent in the plaintiff’s work. A fact-

137. Whether “productive” or “transformative” use guides the first fair use factor, either inquiry threatens to trap courts and litigants into making the kinds of aesthetic judgments that the copyright system expressly disclaims. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”); *Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983) (“[J]udges can make fools of themselves pronouncing on aesthetic matters.... [A]rtistic originality is not the same thing as the legal concept of originality in the Copyright Act.”). Judgments of creative merit tend to emerge nonetheless. See Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1 (2001); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 266-97 (1998).

138. On remand in *Campbell*, the plaintiff was given the burden of developing evidence of market injury caused by the defendant’s alleged infringement, but the defendant retained the overall burden of proof with respect to fair use. See *infra* note 208 and accompanying text.

139. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

140. See *Sony Corp.*, 464 U.S. at 447-56.

oriented work or other work deemed to involve minimal creativity is presumed to allow broader latitude for noninfringing copying.¹⁴¹ Factual and fact-based works need less in the way of copyright's incentive, require less authorial imagination, and are worth more to future generations of authors and scholars needing access to their contents. Research and scholarship with respect to such works (notably, "purpose and character" concerns) are more likely to be "fair." Other works are deemed to be highly creative (novels, songs) and therefore allow narrower ranges of copying. Later authors (typically, also creating "highly creative" works) are assumed to be as capable of creating on their own, and from their own imaginations, as were the authors whose works they would infringe. Criticism and comment may be favored purposes as to more creative works, but only within relatively narrow bounds.

This view has not been reconciled with the long-standing "nondiscrimination" principle in copyright law. The availability of copyright protection is said not to depend on the content or character of the creative "authorship" manifested in the work, so long as some "minimal" creativity is present.¹⁴² The nondiscrimination principle depends in part on questions of judicial (and administrative) competence to determine the creative character of a work, in part on considerations of equity between contemporaneous authors of different kinds of works, in part on considerations of equity between authors of different eras, and in part on predictive considerations. One cannot know today which work of authorship is likely to be successful, or influential, or beloved. The legal system ought not, therefore, try to encourage or discourage the production of any work, so long as it is at least "minimally" creative. On top of all that, it is not clear that the legal system ever should assume that certain types of works ever can be, even in artistic terms, "more" creative or imaginative than others.

141. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

142. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362-63 (1991); *supra* note 137.

6. *“(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;”*

This factor appears to command courts to undertake a bit of arithmetic. The accused infringer may not borrow “too much” of the copyrighted work, a notion that appears to restate the purpose and character of the use. But as with the “purpose and character” language of the first factor, the language of this third factor offers subtleties. The accused infringer may not borrow an untoward “amount” of the plaintiff’s work. Even if the “amount” is not too great, the “substantiality” must nonetheless pass muster, suggesting (in a way that courts have acknowledged awkwardly) that this third factor has both quantitative and qualitative components.¹⁴³ Again, in apparent violation of the aesthetic nondiscrimination principle, courts are authorized to determine whether a quantitatively minor infringement might nonetheless invade the “heart” of the plaintiff’s work of authorship.¹⁴⁴ What constitutes the “heart” and how the “heart” is to be identified are unclear. The “heart” might be the seat of the creativity expressed in the work (judged either by the author, some relevant audience, or by some panel of qualified experts), or it might be that portion of the work judged to be of the highest economic value.

The quantitative dimension of the third factor might seem to be unproblematic, but courts have not explored its depths in any detail. Even a one-to-one correspondence between the plaintiff’s work and the defendant’s copy, once assumed always to be infringing, may be excused as fair, at least in some cases of infringement involving analog magnetic tape,¹⁴⁵ photocopying,¹⁴⁶ and perhaps some digital reproduction.¹⁴⁷ Even outside this realm, it is not clear how the “quantitative” standard should be reconciled to the purposes of copyright. If copyright law is held to exist for the purpose of providing necessary incentives to otherwise undermotivated authors, and if

143. See *Harper & Row*, 471 U.S. at 564-66. The argument that “character” of the work assesses the relationship between the use and its purpose might be said to make this third factor, and both of its dimensions, redundant.

144. See *id.* at 565.

145. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

146. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973).

147. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

even complete reproduction copyrighted works have no cognizable *ex ante* effect on those incentives in some cases, then under what circumstances should it be said that less-than-complete reproduction has a *more* significant effect, and becomes "unfair?"

7. "(4) the effect of the use upon the potential market for or value of the copyrighted work."

Since courts have not been able to answer this last question effectively under the third fair use factor, they instead have tried to answer it under the fourth fair use factor. The Supreme Court has suggested that courts should use this factor to consider the effect of a possible expansion of the current use by others similar to the defendant: "A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."¹⁴⁸ Under current law, therefore, evidence that large numbers of people have engaged in unconsented reproduction or distribution of the plaintiff's work is likely to count against fair use.

What should we make of the disjunctive "potential market for or value" of the work? "Market" and "value" might be the same thing, but the linguistic distinction appears purposive. The "value" of a commodity often declines over time.¹⁴⁹ Markets, at least to econo-

148. *Sony Corp.*, 464 U.S. at 451; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568. Note how the "noncommercial" language pops into that standard, giving rise to a burden-shifting presumption regarding "commercial" use. Under *Sony*, evidence that the allegedly fair use is commercial leads to a presumption that the use is infringing, and the defendant bears the burden of proving that it is fair. Evidence that the allegedly fair use is noncommercial reverses the presumption.

The "widespread effect" language arguably was implicit in pre-1976 copyright law, as argued by the dissent in *Sony*. See *Sony Corp.*, 464 U.S. at 484 & n.36 (Blackmun, J., dissenting); see also *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901). With the advent of photocopying technology, courts expressed concern that what might begin as small-scale reproduction of copyrighted works for personal or scholarly use might quickly be transformed into large scale reproduction and distribution. See *Williams & Wilkins*, 487 F.2d at 1368 (Cowan, J., dissenting); S. REP. No. 94-473, at 65 (1975) (concluding in the legislative history that many isolated instances of infringements may become, in the aggregate, a major obstacle to copyright protection). But that concern has never developed into a framework for analysis.

149. See Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 799-800 (2003);

mists, are eternal—and “potential” markets are especially so. Does the statute mean to speak of *damage* to the plaintiff? Actual damage likely is not required to defeat fair use; “potential” markets may be affected even if the copyright owner’s purse has not yet suffered, since the defendant may have somehow “prevented” the plaintiff from developing new sources of income.¹⁵⁰ Does the “market” or “value” of “potential” market refer to sales of copies of the work, or also to anticipated royalties? Are lost royalties relevant only if they were anticipated or foreseen at the time of the work’s creation (and therefore connected to some constructive “incentive” calculus in the mind of the author or publisher)? Or it is enough to conclude that a “market” or the work’s “value” has been diminished merely by failure of the accused infringer to compensate the plaintiff voluntarily?

How much weight a court should assign to an alleged “effect” is similarly in doubt. The action or inaction of the accused infringer may be economically inconsequential, at least at present. If the plaintiff can speculate about aggregate “effects” using the Court’s gloss about use that becomes “widespread,” then nearly any use by the defendant is potentially infringing, and never fair. But one cannot argue that the economic effects of small, innocent acts must *always* be aggregated and their effects deemed to support the plaintiff’s claim of infringement. At a sufficiently large level, the conclusion always will be that some economic injury can be demonstrated. Instead, it must be the case that some aggregations do not adversely affect “the potential market” for the work. The fourth factor raises the question of how to relate the effect of an individual’s allegedly “fair” use to the effect of large-scale allegedly “fair” use. As to this point, the statute is silent.

In sum, on its face the statutory text appears to reflect little more than a grant of authority to courts to excuse infringement because it is not the sort of thing that really *is* copyright infringement.

Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 481 (2002).

150. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 106 (2d Cir. 1998); *UMG Recordings Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000); *L.A. Times v. Free Republic*, No. CV. 98-7840, 2000 U.S. Dist. LEXIS 5669, at *65-66 (C.D. Cal. Apr. 5, 2000). Under this approach, even *Sony* likely would have been decided differently. For a completely different perspective, see generally Ku, *Creative Destruction*, *supra* note 80 (arguing that the file sharing cases can be decided by determining that digital versions of works of expression are not entitled to copyright protection, if producers are compensated for their creation in noncopyright determined ways).

Courts have abundant flexibility to assert that the defendant is or is not engaging in the sort of activity that copyright owners should care about, that the defendant has borrowed “not much” or “too much” or “just the right amount” of the plaintiff’s work, and that any alleged injury to the plaintiff is or is not worth worrying about. At the end of the day, this is less an analytic framework than a mechanism for declaring that fair use is simply not infringement—which is the very statement that begins the statute. Since courts already have other tools for declining to find infringement when they want to act flexibly,¹⁵¹ the facial emptiness of the statutory language means that alone, it is almost entirely useless analytically, except to the extent that it structures the collection of evidence that a court might think relevant to its decision.

B. Theories of Fair Use

Lloyd Weinreb, coming to virtually the same conclusion,¹⁵² suggests that this result is consistent with the notion that there is no positive theory of fair use, beyond a set of conventions established over time.¹⁵³ But if theory can help in so many other areas of the law, there is little reason that it should not have a role here. Why have the doctrine at all, if it is to have no meaningful content?

As it happens, however, scholarly efforts to rationalize fair use have contributed much to our understanding of copyright overall, but less in the way of a firm structure for fair use. Theories of fair use closely track theories of copyright more generally. The latter generally can be broken down into those that focus on consequentialist concerns¹⁵⁴ and those that do not. Nonconsequentialist (moral and natural rights) arguments have the weaker

151. The court might declare that the copyright owner’s exclusive rights under § 106 are not implicated, or might find an absence of “substantial similarity” between the plaintiff’s work and the defendant’s work, for example. *See supra* note 7 and accompanying text.

152. *See* Lloyd L. Weinreb, *Fair Use*, 67 *FORDHAM L. REV.* 1291, 1298 (1999) (concluding that the doctrine relies on the notion that the assumptions on which copyright is based do not apply).

153. *See id.* at 1307-10.

154. Instrumental arguments can be broken down further into utilitarian arguments, which are defined currently in mostly monetary or economic terms, and arguments based on noneconomic goals. *See* Joseph H. Sommer, *Against Cyberlaw*, 15 *BERKELEY TECH. L.J.* 1145, 1223-25 (2000); David McGowan, *Copyright Nonconsequentialism*, 69 *MISSOURI L. REV.* (forthcoming 2003).

hand generally as a matter of doctrine, given the Supreme Court's formal rejection of non-incentive-based theories of copyright law generally.¹⁵⁵ As a result, such theories have little to offer by way of affirming fair use.¹⁵⁶

The most prominent utilitarian account of fair use comes from Wendy Gordon. Taking the goal of copyright as maximizing social welfare and assuming that an economically efficient market system is the best way to maximize social welfare (because of its ability to process individual utility preferences), fair use plays a role in copyright principally to the extent that it cures "market failures" of one sort or another.¹⁵⁷ Fair use is disfavored if the defendant's use interferes with the operation of an actual or potential market for the work; it is favored if the market is unlikely to permit the transfer and if the defendant can demonstrate the particular social value of the use.¹⁵⁸ Both in its presumption in favor of the market in all cases, and in its focus on the defendant's particular use, the "market failure" approach is seen as not only lacking an affirmative vision of what fair use should be (since as "the market" expands, fair use

155. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359-61 (1991).

156. See Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 51-53 (1997) (arguing that moral rights are fundamentally incompatible with fair use); Garon, *supra* note 7, at 1301 ("The sacrilege of fair use, parody, and the public domain would tear at this sacred bond between author and work.").

157. See Gordon, *supra* note 15, at 1610-14. Economic models of copyright as a whole are developed, among other places, in William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998) (describing a contractual price discrimination model); Paul Goldstein, *Copyright and Its Substitutes*, 1997 WIS. L. REV. 865, 866; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (elaborating on a model based on appropriability of returns from public goods); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996) (discussing a transactions cost model); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001) (describing a model based on price discrimination). The limits of the neoclassical economic model in copyright are discussed in Cohen, *Lochner in Cyberspace*, *supra* note 18, at 480-515.

158. Some recent cases have adopted this approach. In *American Geophysical Union v. Texaco, Inc.*, the Second Circuit wrote:

[I]t is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier [I]t is sensible that a particular unauthorized use should be considered "more fair" when there is no ready market or means to pay for the use The vice of circular reasoning arises only if the availability of payment is conclusive against fair use.

Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930-31 (2d Cir. 1994). See also *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1386-88 (6th Cir. 1996).

likely contracts), but is also seen as hostile to fair use in most cases.¹⁵⁹

Arraying utilitarian arguments for copyright in service of an expansive reading of fair use, Raymond Ku argues that fair use can be theorized as a species of justifiable “creative destruction” of copyright markets, in which uncompensated uses challenge existing production and distribution structures but do not undermine underlying incentives to create new works.¹⁶⁰ The overall efficiency of the system is preserved so long as consumers internalize their costs of consumption not by paying for each additional copy of a work (the premise of the “market failure” model, above), but by paying for technologies of consumption, such as computers, Internet access, and VTRs. Ku argues forcefully that this perspective justifies a finding of fair use in the file sharing context. This is a provocative recasting of the economic argument for copyright, but it has relatively little to offer as an affirmative account of fair use. As with the “market failure” hypothesis, the “creative destruction” hypothesis allows room for fair use just so long as the efficiency of the underlying market for the creation of new works is preserved—that is, so long as consumers do indeed fully internalize the full cost of their consumption of copyrighted works.¹⁶¹ To the extent that an efficient

159. See Lunney, *supra* note 14, at 985-88 (arguing that fair use represents an affirmative balancing between users and copyright owners); Loren, *supra* note 118, at 25-27 (advocating for an expansion of market concepts in fair use cases that values externalities generated by “fair” uses). But see Jonathan Dowell, Comment, *Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World*, 86 CAL. L. REV. 843, 876-77 (1998) (arguing that the market failure premise for fair use does not necessarily lead in all cases to a denial of fair use privilege even if the market exists). Gordon has argued that her initial proposal placed more emphasis on distributive values than has been recognized typically. See Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, in THE COMMODIFICATION OF INFORMATION 149 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031 (2002). Other proposals explicitly to recognize redistributive social values via fair use (even in the presence of functioning markets) include Robert P. Merges, *The End of Friction? Property Rights and Contract in the “Newtonian” World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 134-35 (1997) (arguing in favor of express recognition of redistributive features of copyright); Okediji, *supra* note 14, at 146-53 (same).

160. See Ku, *Consumers*, *supra* note 80, (arguing that file sharing system use should be “fair” so long as copyright owners’ incentives are preserved via income from other sources).

161. See Ku, *Creative Destruction*, *supra* note 80, at 294-99.

market demands that consumers obtain permission, fair use should give way.¹⁶²

Opening up the consequentialist framework to concerns beyond efficiency or monetized utility creates new possibilities for an affirmative role for fair use, but in practice proposals along these lines are unhelpfully broad. Glynn Lunney argues that in any particular case, the court ought to balance the copyright owner's interest in, and incentive derived from, protection of the copyright against the interests of the individual defendant and the public implicated in unconsented access and use.¹⁶³ William Fisher's proposed "reconstruction" of fair use takes largely the same approach, blending concerns of economic efficiency with the goal of achieving "a substantive conception of a just and attractive intellectual culture."¹⁶⁴ Alternatively, but relatedly, fair use might be designed to privilege or subsidize certain special uses, whether in connection with producing additional creative works (independent of the extent to which such works are, or may be, undervalued by the market) or with subsidizing other valuable social, cultural, and/or political interests. But there is little agreement as to which types of access and use ought to receive such special treatment, limiting the value of this approach. Such privileges may extend to scientific and educational research,¹⁶⁵ "transformative" uses, such as parody and criticism,¹⁶⁶

162. Cf. Weinreb, *supra* note 152, at 1306 (noting that the essential problem with economic theories of copyright is that they depend on a calculus of incommensurables).

163. See Lunney, *supra* note 14, at 981-85 (describing *Sony* as balancing); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 492-98 (indicating that the balancing of such interests is essential to an economic analysis of copyright law).

164. See Fisher, *supra* note 15, at 1477. Fisher in fact articulates two distinct models of fair use, one based on the efficiency premise alone and a second that adds dimensions based on the "just culture" premise.

165. See PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 230 (1994); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 101 n.216 (1997) (emphasizing importance of access rights for both scientific and educational communities).

166. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-80 (1994) (noting that transformative uses such as parody contribute to the progress of science and the arts); *Micro Star v. FormGen, Inc.*, 154 F.3d 1107, 1113 n.6 (9th Cir. 1998) (stating that transformative use is entitled to broader deference); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1034-36 (1990) (recognizing that transformative uses are commonplace and often are not infringing uses); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 884-86 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE

use that furthers or supports "democratic values" of informed citizenship and political participation,¹⁶⁷ idiosyncratic visions of the good or fair community,¹⁶⁸ personal or private use,¹⁶⁹ and/or noncommercial use,¹⁷⁰ among other things.

Jessica Litman's proposal comprehensively to restructure copyright around the copyright owner's legitimate interest in commercial exploitation of the work¹⁷¹ offers the virtues of simplicity and relative clarity, particularly from the standpoint of the prospective consumer user. The proposal echoes and updates Ray Patterson's conviction that copyright has always been and should remain essentially regulatory, rather than proprietary,¹⁷² and from that

CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (arguing that the existing fair use doctrine should be construed to protect radical improvements wrought by the transformative user); Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y OF THE U.S.A. 546 (1998) (emphasizing the utility of parody and satire in promoting the goals of copyright law); Leon R. Yankwich, Comment, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 214 (1954) (suggesting that publishing a work constitutes, in part, an invitation to consume for purpose of criticism). Judge Leval argued that the *Campbell* decision restored a normatively and prescriptively appropriate equilibrium to fair use jurisprudence as a whole. See Pierce N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 23-26 (1994).

167. See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1036-38 (1996) (arguing that law should be amended to address privacy concerns of individuals in using copyrighted networked materials); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 364-82 (1996) (linking copyright policy to political foundations of liberal society).

168. See Fisher, *supra* note 15, at 1744-94 (arguing that the fair use doctrine could promote development of ideal visions of the American community); Weinreb, *supra* note 21, at 1152-53 (arguing that fair use represents a community sense of "fairness," but not explaining how such a sense might arise and extend beyond a particular case). The "good life"/community construction argument can be made from perspectives internal to fair use and copyright, which might be said to manifest their own sense of the right community, or from one or more external perspectives.

169. On the role of personal use in copyright, see Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 283-89 (1996); Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 854-55 (1997); Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129 (2001).

170. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 39-47 (1996) (discussing the difference between using copyrighted material for commercial and noncommercial purposes). Dennis Karjala proposed a variation on exemptions for noncommercial use: a distinction between "widely distributed" and "generally inaccessible" works. See Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 522-25 (1997).

171. JESSICA LITMAN, *DIGITAL COPYRIGHT* 171-82 (2001).

172. See L. Ray Patterson, *Understanding Fair Use*, LAW & CONTEMP. PROBS., Spring

perspective fair use remains (as Patterson argued it should) derivative of copyright itself. Before one can approach fair use from this perspective, however, one needs to understand what “commercial use” might mean or, more generally, how to cabin the regulatory approach, just as one needs a framework for cabining the economists’ property-based approach.¹⁷³

In all, the number of competitors and the vigor of the debate only to the conclusion that what fair use means, and what it should mean, is no more clear as a theoretical matter than it is as a doctrinal matter. In practice, the only way to deal with both sorts of indeterminacy seems to be to approach disputes on a highly contextualized basis.¹⁷⁴ The next Part takes up the topic of how to frame that context. In the remaining section of this Part, however, I consider how judicial interpretations of the fair use doctrine have failed to seize opportunities to give the doctrine a coherent contextual structure.

C. The Modern Judicial Response

In the encounter between a critic, scholar, or consumer and a copyrighted work, fair use potentially enters the licensing calculus twice: once when the user is deciding whether to rely on the fair use doctrine or instead to obtain permission from the copyright holder, and a second time (assuming that permission was not obtained) during possible later litigation. Fair use thus plays an important *ex ante* role in structuring uses of copyrighted works, a role that is frustrated by the confusing character of the statutory text and not helped much by scholarly theorizing about markets or the special

1992, at 249.

173. See *infra* notes 157-62 and accompanying text.

174. Justin Hughes rightly points out the essential lack of distinction between work and context with respect to legal questions involving creativity. See Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 24 (2001). In a sense, therefore, I am supposing the existence of a dividing line where one perhaps ought not to exist. As I hope to make clear, however, it appears that courts have adopted and relied on such a line. Cf. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (criticizing courts for failing to develop a consistent set of principles or values to govern fair use).

favours that copyright owes science, education, the democratic process, or the energies or personality interests of authors.¹⁷⁵

The courts, and the Supreme Court in particular, might play an especially useful role here, offering a gloss on the doctrine that could guide lower courts and copyright counsel and thus help to rationalize planning decisions in a way that might be more sensible than taking the opinions apart only to see their connections to the separate four fair use factors. The Court's fair use jurisprudence has formally disclaimed a rationalizing role, leading not to the emergence of a coherent gloss on fair use but to fragmentation of the doctrine.¹⁷⁶ The Supreme Court has given us three significant accounts of fair use. Below, I review the major doctrinal points offered in each of the Court's fair use opinions.

1. *Williams & Wilkins Co. v. United States*

The first milepost in the Court's fair use case law is an opinion that never was. *Williams & Wilkins Co. v. United States*¹⁷⁷ affirmed by an equally divided Court (and therefore without an opinion) a decision by the United States Court of Claims that the National Institutes of Health (NIH) had not infringed copyrights, by reason of the defense of fair use, when it photocopied entire scholarly articles from scientific journals for distribution to NIH researchers. The Court of Claims had reasoned that the defendant's photocopying, though extensive, had not been shown to damage the interests of the publishers and that the interests of medical research and science in general likely would be injured by a judgment in the plaintiff's favor.¹⁷⁸

The Court split 4-4, Justice Blackmun not participating, and thus lost an opportunity to define the scope of the fair use doctrine at a

175. Of course, on the strongest form of market-oriented fair use, the planning calculus is clear: the ostensible user should always obtain express permission. Failure to do so constitutes either failure to acknowledge an existing market or the creation of an unlawful impediment to the emergence of a new market.

176. See Madison, *Legal-Ware*, *supra* note 18, at 1099-1105 (discussing the various approaches that courts take in analyzing fair use cases); David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, *LAW & CONTEMP. PROBS.*, Winter/Spring 2003, at 263, 266-84 (arguing that recent cases suggest fundamental unpredictability of fair use).

177. 420 U.S. 376 (1975).

178. *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353-54 (Ct. Cl. 1973).

time just prior to its incorporation into the statutory copyright scheme.¹⁷⁹ Among other things, the case presented the then-novel question of the applicability of fair use to wholesale, literal reproduction of copyrighted works by putative “consumers” of those works. It also presented the disjuncture between a relatively small-scale practice (photocopying of pages of an individual article by a single or small number of readers) that likely was neither damaging to authors and publishers nor grossly out of step with historical practice, on the one hand, and the import of that small-scale practice being repeated extensively, over a long period of time by large numbers of “consumers” and publishers, on the other hand.

2. Sony Corp. of America v. Universal City Studios, Inc.

The Court’s first in-depth encounter with fair use came in 1984 in *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁸⁰ the “Betamax” case. Sony stood accused of contributory and vicarious copyright infringement by virtue of its distribution of Betamax VTRs, which enabled television viewers to infringe copyrights in broadcast television programs by recording them onto videotape.¹⁸¹ The Court reversed the Ninth Circuit’s ruling against Sony, deciding that Sony was not liable so long as the machines were “capable of substantial noninfringing uses.”¹⁸² The noninfringing uses consisted largely of fair use by television viewers, who, the record demonstrated, were engaged in private, personal “time-shifting” of their favorite programs.¹⁸³

The Court’s route to its decision focused on the first and fourth fair use factors, which favored VTR users, and downplayed the second and third factors, which favored the plaintiff. The first question that the Court posed was whether television viewers were engaged in “commercial” use of the broadcast programs, as a commercial use

179. The Court accepted one earlier fair use case, but it merely accepted a finding that infringement had occurred by affirming the lower court decision by a 4-4 vote, and therefore without an opinion. See *Benny v. Loew’s, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff’d by an equally divided Court*, 356 U.S. 43 (1958) (affirming judgment of infringement by Jack Benny of the copyright in the motion picture *Gaslight*).

180. 464 U.S. 417 (1984).

181. See *id.*

182. See *id.* at 442.

183. See *id.* at 447-50.

would be presumptively infringing. Viewers in this case, however, were using their Betamax for "time-shifting," so that they could record broadcast programming for later viewing. The Court contrasted this use with "librarying"—recording programs for archival purposes.¹⁸⁴ Neither "time-shifting" nor "librarying" was "commercial" in the sense that viewers were reselling the tapes, but the Court distinguished the former as fair and, by implication, the latter as presumptively unfair.

The Court's discussion of the fourth factor clarified the difference: "time-shifting" implicated no revenue loss for the copyright holders, since advertisers could be assured that their programs would still be watched and therefore would still be willing to pay market prices.¹⁸⁵ "Librarying" entailed no equivalent assurance that programs would be watched, and it further threatened to interrupt a nascent market for prerecorded tapes. Given this analysis of the first and fourth factors, the Court discounted the effects of the third factor (that the entirety of the programs were being recorded), even though in traditional fair use analysis that factor ordinarily would favor the plaintiffs.¹⁸⁶ The Court characterized the second factor, the nature of the copyrighted work, as favoring fair use, since the viewing audience was recording and watching television programs that it had already been invited to watch for free.¹⁸⁷

Sony offered two points of guidance to future courts and litigants: that the law should distinguish sharply between "commercial" (presumptively unfair) use and "noncommercial" (fair) use, and that the fourth factor should play a dominant role in the fair use calculus. The Court sidestepped the question of constructing the appropriate framework for relating an individual's use of the work to use of that work on some larger scale.¹⁸⁸

184. *See id.* at 451.

185. *See id.* at 452-53.

186. *See id.* at 449-50.

187. *See id.* at 449.

188. *See id.* at 482 (Blackmun, J., dissenting). The dissenting Justices argued that isolated, harmless uses may, in the aggregate, injure the copyright owner's interests, but they did not suggest any particular point—other than the line between "unproductive" and "productive" use—at which such harmless use becomes infringing. *See id.* Would it be the case that an individual use must be "productive" in order to avoid the aggregation test, or would it be sufficient to show that the aggregation was "productive" even if each individual's use might not be?

3. Harper & Row, Publishers, Inc. v. Nation Enterprises

The Court's decision the following year in *Harper & Row, Publishers, Inc. v. Nation Enterprises*¹⁸⁹ largely reinforced both points, while adding some others. Harper & Row was in the process of publishing the memoirs of President Gerald Ford and had agreed that *Time* magazine would have first serialization rights.¹⁹⁰ *The Nation* magazine covertly obtained a prepublication manuscript of the book and published a short column highlighting details of Ford's account of his negotiations with his predecessor, Richard Nixon, over the terms of a possible pardon for Nixon's Watergate activities. *Time* backed out of its deal with Harper & Row, and Harper & Row sued *The Nation* to recover the unpaid fee.

The Court reversed the Second Circuit's ruling in favor of *The Nation*, holding that the unpublished nature of the Ford manuscript weighed heavily against a finding of fair use and that *The Nation's* knowledge of the manuscript's unpublished nature, coupled with the financial injury (the lost serialization fee) suffered by Harper & Row, confirmed the inapplicability of the fair use defense. The Court emphasized its statement in *Sony* that "commercial" use was presumptively unfair, if not per se infringing, and it emphasized that the fourth fair use factor, addressing the scope of the plaintiff's injury, was first among equals in applying the four fair use factors.¹⁹¹ The character of the copyrighted work (Ford's memoir) was

189. 471 U.S. 539 (1985).

190. Harper & Row had obtained from President Ford the right to publish the work "in book form," and it had licensed to *Time* the right to publish prepublication excerpts of the manuscript, known as "first serial rights." *Id.* at 542. The Court's analysis of the case characterized *The Nation's* distribution of an unauthorized prepublication excerpt as infringement of the copyright owner's alleged exclusive right of first publication. *See id.* at 549, 552; *supra* note 126 and accompanying text (noting abolition by statute in 1976 of publication as a prerequisite of statutory copyright and thus of the common law "right of first publication"). The Court apparently understood the copyright owner's exclusive right to distribute the work to embody a statutory "right of first publication." *See* Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CAL. L. REV. 369 (2001) (noting anachronistic character of *Harper & Row's* analysis and suggesting alternative framework for preserving privacy interests of authors of unpublished materials).

191. Though less important to the course of the fair use doctrine, the Court also dismissed *The Nation's* argument that it had an independent First Amendment defense to the charge of copyright infringement by virtue of its status as a news organization. Any First

characterized as “creative” (rather than “factual”) and therefore deserved broad protection.¹⁹² Though the amount of the work reproduced was slight in quantitative terms, the Court agreed with the district court that *The Nation* had taken “the heart of the book,” that is, that portion of the memoir that had the greatest commercial appeal.¹⁹³ *Time*’s decision not to pay Harper & Row the balance of the promised serialization fee constituted clear evidence of injury to the market for the work.¹⁹⁴

Although in these important senses *Harper & Row* mostly continued themes introduced in *Sony*, in one important sense the case represents a departure. *Sony* understood the fair use problem as how to deal with a social practice, though the Supreme Court did not wrestle with the problem in an especially persuasive way. In *Harper & Row*, for the first time the Court spent virtually all of its analytic energy on the works of authorship themselves—both the Ford manuscript that was the basis for the plaintiff’s claim and the magazine column that was the target of the suit.

4. Campbell v. Acuff-Rose Music, Inc.

The Court did not take up the fair use doctrine again for nearly ten years,¹⁹⁵ but when it did, in *Campbell v. Acuff-Rose Music*,

Amendment interests implicated by *The Nation*’s conduct and by copyright law generally were subsumed in the fair use doctrine itself. *Harper & Row*, 471 U.S. at 555-60. That the copyright statute is essentially immune from examination under the First Amendment was confirmed by the Court in *Eldred v. Ashcroft*, 537 U.S. 186, 218-19 (2003) (citing *Harper & Row*’s treatment of the First Amendment).

192. See *Harper & Row*, 471 U.S. at 564-65.

193. See *id.* at 565.

194. See *id.* at 567.

195. Fair use was argued in one intervening case, *Stewart v. Abend*, 495 U.S. 207 (1990), but the Court’s brief discussion there only reaffirmed its analysis in *Harper & Row*. The primary issue in *Stewart* was whether the owner of the copyright in the short story on which Alfred Hitchcock and Jimmy Stewart based the movie *Rear Window* was entitled to terminate Hitchcock’s and Stewart’s authority to distribute that film. The initial license had been negotiated with the holder of the initial copyright term. The litigation was brought by the holder of the renewal term. The Court held that continued distribution of the film was infringing, since the renewal term constituted a new copyright “estate” unencumbered by licenses negotiated during the initial term. See *id.* at 230.

As part of its ruling, the Court considered and affirmed the Ninth Circuit’s decision on the question of fair use, ruling that unauthorized preparation and distribution of the film could not be considered to be “fair use” of the short story. See *id.* at 236-38. Exploitation of the film amounted to a commercial use, which was presumptively unfair. The initial work was

Inc.,¹⁹⁶ it appeared to take some of the edge off of *Sony* and *Harper & Row*. The plaintiff in *Campbell* was the owner of the copyright to the song "Oh, Pretty Woman," originally recorded by Roy Orbison¹⁹⁷ and rerecorded and repopularized as the accompaniment to the enormously successful movie *Pretty Woman*. The defendant was Luther Campbell, known alternatively by his rap moniker, Luke Skyywalker, front man for the rap trio 2 Live Crew.¹⁹⁸ 2 Live Crew released a rap version of "Oh, Pretty Woman," keeping the famous introductory bass riff, the basic structure of the song, and most of the initial stanza of the lyrics, but modifying the balance of the lyrics: changing the benign description of the streetwalker's life in the original to a blunt, explicit description of street life in the contemporary urban landscape.¹⁹⁹ The district court granted 2 Live Crew's motion for summary judgment on the ground that the defendants' song constituted fair use.²⁰⁰ The court of appeals reversed, concluding (given its reading of *Sony*) that the commercial nature of the song rendered it categorically ineligible for consideration as fair use.²⁰¹ The Supreme Court reversed.²⁰²

The Court formally retreated from its earlier statements placing the fourth factor at the apex of the fair use pyramid. All factors, it ruled, should be considered together.²⁰³ The Court confirmed that parody, at least, is a legitimate form of fair use under the first factor, so long as the "parodic" character of the defendant's work,

creative, rather than factual, and substantially all of the story was used in the film. *See id.* at 237-38. (The screenplay's addition of a major character, played by Grace Kelly in the film, was found irrelevant.) And the fourth fair use factor, again characterized as the most important of the four, clearly weighed against fair use, since a finding of fair use would interfere with the copyright holder's ability to market adaptation rights under the renewal term. *See id.* at 238. This argument has the ring of circularity to it, since at the time the case was filed and decided it is doubtful that the copyright owner—which had purchased the rights to the renewal term from the estate of the original author—had any credible interest in new adaptations of the short story. With the expansion of the motion picture market in the late 1990s as a result of videotape sales, Hitchcock's *Rear Window* indeed was remade by Hallmark Entertainment for television in 1998, in a version that was produced by and starred Christopher Reeve.

196. 510 U.S. 569 (1994).

197. *Id.* at 572.

198. *Id.*

199. *Id.* at 581-83.

200. *Id.* at 573.

201. *See id.* at 573-74.

202. *Id.* at 594.

203. *See id.* at 578.

critiquing the plaintiff's work, can be reasonably perceived.²⁰⁴ Putting this standard into a broader context, the Court noted that the first factor would weigh more heavily in favor of the defendant to the extent that the defendant had "transformed" the plaintiff's work, and that such transformation could overcome a charge that the defendant's work was otherwise "commercial."²⁰⁵ The second factor weighed in the plaintiff's favor, since a popular song would be deemed to be "creative." The Court discounted the fact that the defendant had copied the entirety of the song, under the third factor, since the amount of copying was dictated largely by the nature of the parodic use.²⁰⁶ The Court noted that market harm that resulted from legitimate criticism of an original work might be substantial—a poor review can cause ticket or album sales to collapse—but would not be relevant to market analysis under the fair use statute.²⁰⁷ The market harm with which copyright law is concerned is the harm that results from substitution of the defendant's work for the plaintiff's. Criticism that depresses the plaintiff's market without offering the defendant's work as a substitute is irrelevant. Though in its tone the Court clearly signaled its sympathy with the fair use defense, it remanded the case, indicating that the plaintiff could yet introduce evidence that the parody version had usurped a forecast market for a rap derivative of the Orbison original.²⁰⁸

5. Fair Use in the Circuits

The unsurprising result of the Court's emphasis on the case-by-case character of fair use adjudication, and its insistence that the doctrine focus so narrowly on the works of authorship themselves,

204. See *id.* at 582. This put to rest any possible uncertainty about the status of parody as fair use remaining since the Court's affirmance of a judgment of infringement in *Benny v. Loew's, Inc.* See *supra* note 179. The Ninth Circuit concluded in *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986), that the 1976 Copyright Act effectively trumped *Benny* when parody appeared on the list of possibly protected "fair" uses in the statute's legislative history.

205. See *Campbell*, 510 U.S. at 578-85. On the unhelpfulness of an abstract "transformative use" standard as a unifying theme for fair use, see Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y OF THE U.S.A. 251 (1998).

206. See *Campbell*, 510 U.S. at 586-89.

207. See *id.* at 591-92.

208. *Id.* at 593.

is confirmation of the view that the doctrine today is so abstract that it has virtually no content. Or, perhaps more accurately stated, the doctrine appears to be so fragmented as to make it useless as a predictive device for copyright owners, copyright consumers, and for courts. The text of the Court's fair use opinions signals to every potential fair use claimant and defendant that theirs is a *sui generis* situation, where the facts of the cases that have gone before have little bearing on the right or even likely result in the next case. Every fair use situation presents only an opportunity to scrutinize the work itself and its market,²⁰⁹ and the statutory text is flexible enough to accommodate nearly any result that a court might prefer. In the next Part, I argue that this result is both at odds with congressional intent and at odds with a better reading of both pre- and post-1978 fair use case law. In the balance of this Part, I illustrate this concern²¹⁰ by describing recent appellate cases that raise problems that appear to be nearly identical to those presented in the Supreme Court cases discussed above. In each instance, the more recent courts approach the fair use issue not as an opportunity to elaborate on and refine the related Supreme Court cases, but as an invitation to start from scratch with the four fair use factors.

a. Williams & Wilkins and Photocopying: American Geophysical Union v. Texaco, Inc. and Princeton University Press v. Michigan Document Services

Treatment of the legitimacy of photocopying in *Williams & Wilkins Co. v. United States*²¹¹ is compared frequently with how photocopying in the academic and research communities has been treated more recently, in *American Geophysical Union v. Texaco, Inc.*,²¹² and *Princeton University Press v. Michigan Document Services*.²¹³ The Court of Claims in *Williams & Wilkins* engaged in a cost-benefit

209. Judge Posner's opinion in *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002) (determining book of information and photographs about stuffed "Beanie Baby" toys to be fair use), relies on this theme in a particularly elegant way.

210. A similar proposition is illustrated with different evidence in Madison, *Legal-Ware*, *supra* note 18, at 1100-05.

211. 420 U.S. 376 (1975).

212. 60 F.3d 913 (2d Cir. 1994).

213. 99 F.3d 1381 (6th Cir. 1996).

analysis in the context of a then-new technology.²¹⁴ The clear benefits of broad distribution of scientific and medical research were held to outweigh the relatively nominal cost to the copyright holder before the court. In both of the more recent cases, courts not only in effect refused to engage in a comparable analysis, but, more importantly, they implicitly rejected the premise that the *Williams & Wilkins* case itself (and the photocopying practices examined in that case) constituted a relevant data point that the more recent courts should account for in their analysis of fair use claims.

In *American Geophysical Union*, the Second Circuit upheld a copyright infringement claim by publishers who argued that scientists at Texaco had photocopied entire articles from scientific journals for their convenience and, sometimes, for circulation within the company.²¹⁵ In *Princeton University Press*, the Sixth Circuit held a for-profit photocopying company liable for photocopying substantial portions of scholarly books and the entirety of some scholarly articles while preparing coursepacks for university students, at the behest of the students' professors but without the permission of the relevant publishers.²¹⁶

In both cases, the courts considered the defendants' fair use arguments in detail but did so entirely within the context of the Supreme Court's admonition that the doctrine is to be applied on a "case-by-case" basis. Accordingly, and without reference to the defendants' practices at issue in *Williams & Wilkins*,²¹⁷ both courts relied extensively on case-specific analyses of the first and fourth fair use factors. In both cases, the use in question was deemed to be "commercial" (in *American Geophysical Union*, because reading and relying on scientific literature was part of Texaco's process of producing commercial products;²¹⁸ and in *Princeton University Press*, because the copy shop defendant was a for-profit enterprise).²¹⁹ In both cases, there was clear evidence of injury to a relevant publisher's market because both defendants had credible opportunities to pay

214. See *supra* Part II.C.1.

215. See *Am. Geophysical Union*, 60 F.3d at 915-16.

216. See *Princeton Univ. Press*, 99 F.3d at 1383.

217. Both courts cited *Williams & Wilkins* only to note that a licensing market for the relevant works existed in the more recent cases, as it did not in *Williams & Wilkins*. See *Princeton Univ. Press*, 99 F.3d at 1388; *Am. Geophysical Union*, 60 F.3d at 924.

218. See *Am. Geophysical Union*, 60 F.3d at 921-22.

219. See *Princeton Univ. Press*, 99 F.3d at 1383.

per-copy or per-page licensing fees, or to buy entire new copies of the works in question, and failed to do so.²²⁰

b. Sony and Time-Shifting: A & M Records v. Napster and Recording Industry Association of America v. Diamond Multimedia Systems

VTR users in *Sony Corp. of America v. Universal City Studios, Inc.*²²¹ were characterized by Sony and ultimately by the Court as engaged in legitimate “time-shifting” of broadcast television programs. The “shifting” element of that case has been neologized to encompass alleged “space-shifting” by consumers of digital versions of recorded music. The claim has been presented twice at the appellate level and accepted once, in *Recording Industry Association of America v. Diamond Multimedia Systems*,²²² and rejected once, in *A & M Records, Inc. v. Napster*.²²³ In both cases, as the description of the Court’s cases would predict, fair use analysis concentrated less on the character of what the individual users were alleged to be doing, as contextualized by history, tradition, or other cultural influence, and (formally, at least) concentrated more on the character of the individual works in question.

“Space-shifting” received only the briefest of analyses in dicta in *Diamond Multimedia*, but the court’s reference is clear enough to suggest both how the court would have ruled had the issue been presented squarely, and the manner in which the court would have reached its result.²²⁴ At issue in the case was whether a digital computer device called the Rio, capable of storing and playing back digital MP3 files, was required to comply with the technical requirements of the Audio Home Recording Act (AHRA).²²⁵ The AHRA requires that certain digital devices (paradigmatically, digital audio tape (DAT) players and recorders) embody a technical system that limits making multiple reproductions of digital recordings.²²⁶ The Ninth Circuit held that in light of definitional limitations of the

220. *See id.* at 1387-88; *Am. Geophysical Union*, 60 F.3d at 929-31.

221. 464 U.S. 417 (1984).

222. 180 F.3d 1072 (9th Cir. 1999).

223. 239 F.3d 1004 (9th Cir. 2001).

224. *See Diamond Multimedia Sys.*, 180 F.3d at 1079.

225. *See id.* at 1075.

226. *See* 17 U.S.C. §§ 100110-10 (2000).

AHRA, the statute did not apply.²²⁷ In so ruling, the court raised and addressed the public policy behind both the AHRA and the Copyright Act in general, noting that the Diamond Rio was aimed at facilitating "personal use" of copyrighted works, via "space-shifting" of prerecorded music by copying digital files from other (presumably less portable) media to the highly portable Rio.²²⁸ "Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the [Audio Home Recording] Act," the court wrote, citing *Sony*.²²⁹ Both that language and the court's citation to *Sony* strongly imply that had the court been asked to elaborate, it would have concluded that moving a digital sound file from a desktop computer to a Rio on a belt loop likely had no cognizable effect on the copyright holder's potential income from that work.

Any other conclusion would mandate a result like the one the same court reached in *A & M Records, Inc. v. Napster*. As noted above,²³⁰ the court's conclusion that use of Napster's MusicShare software did not constitute fair use relied extensively on analysis of the facts only of the case before it, as applied to the copyrighted works in question. The court asked "whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character" to the original work,²³¹ and "whether the allegedly infringing use is commercial or non-commercial."²³² The court found that the district court did not err in concluding that users' behavior neither transformed the underlying work because each song was "merely retransmitted in a different medium,"²³³ nor was it noncommercial, because each user uploading a song was "distributing" the work to an unknown and anonymous recipient,²³⁴ and each user downloading a song was getting something for free that otherwise the user would have had to purchase.²³⁵

227. See *Diamond Multimedia Sys.*, 180 F.3d at 1075-79.

228. *Id.* at 1079.

229. *Id.*

230. See *supra* notes 62-68 and accompanying text.

231. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (2001).

232. *Id.*

233. *Id.*

234. *Id.*

235. See *id.* This begs the very questions that the court was asked to analyze: whether users were reproducing or distributing "copies" of the plaintiffs' works, and whether they were entitled to do so for free, as a matter of fair use.

The court agreed with the district court that the creative nature of the works (musical compositions and sound recordings) militated against a finding of fair use. The court noted that both uploading and downloading a work via the Napster system involved copying the entire work, thus suggesting that a finding of no fair use was warranted.²³⁶ The court concluded that the district court had not erred in finding the presence of an effect on the market for plaintiffs' works in this case, partly on the basis of evidence that sales of compact discs to college students had been affected negatively by MusicShare use,²³⁷ and partly on the basis of the plaintiffs' argument that the Napster system prejudiced the plaintiffs' ability to decide whether and when to enter the market for Internet downloads of their copyrighted works.²³⁸ Napster also argued that the district court erred in refusing to consider two possible "identified" uses as "fair uses": sampling, which describes the practice of using Napster technology to download music files in order to determine whether to purchase a copy of the recording, and space-shifting, the neologism coined in connection with *Diamond Multimedia*,²³⁹ to describe the practice of downloading MP3 files via MusicShare that the user already "owns" on a compact disc.²⁴⁰ The court of appeals agreed with the district court that sampling failed to qualify as a fair use because of its essentially commercial nature (thus reiterating its analysis of the first fair use factor) and because of its effect on the market for online distribution of recorded music (thus reiterating its analysis of the fourth factor).²⁴¹ The court of appeals sup-

236. *Napster*, 239 F.3d at 1016.

237. *See id.* The district court excluded or disregarded evidence submitted by Napster that use of its system either caused no net harm or was in fact associated with an increase in sales of prerecorded music. Some subsequent research corroborated the material offered by Napster. *See* Matt Richtel, *Access to Free Online Music Is Seen as a Boost to Sales*, N.Y. TIMES, May 6, 2002, at C6 (reporting study by Jupiter Media Metrix that concluded that use of file sharing networks led to increased spending on prerecorded music); Brad King, *Record Biz Has Burning Question* (June 14, 2002), at <http://www.wired.com/news/MP3/0,1285,53157,00.html> (reporting study by Ipsos-Reid suggesting that file sharing network use leads to increased spending on compact discs).

238. *See Napster*, 239 F.3d at 1018-19.

239. *See supra* notes 224-29 and accompanying text. A "space-shifting" defense was also raised and rejected in the *My.MP3.com* litigation, *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

240. *Cf. Recording Indus. Ass'n v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1072 (9th Cir. 1999).

241. *See Napster*, 239 F.3d at 1018.

plemented this analysis by rejecting a further argument, that music sampling was likely to be "fair" because it has the effect of increasing, rather than decreasing, sales of recorded music.²⁴² The court gave equally short shrift to arguments regarding "space-shifting," on the ground that "space-shifting" in *Diamond Multimedia* did not involve the simultaneous distribution of the work to the general public. "Space-shifting" did not constitute fair use in *Napster* because MusicShare users infringed by distributing, rather than simply "using," copyrighted works.²⁴³

c. *Harper & Row and the News: The Los Angeles News Service Cases*

The uneven contemporary application of the *Harper & Row, Publishers, Inc. v. Nation Enterprises*²⁴⁴ framework journalism is exemplified by a series of cases involving different kinds of use of a single copyrighted "work"—videotape footage of the beating of a truck driver during the 1992 Los Angeles riots that followed the trial acquitting white police officers accused of beating Rodney King. The

242. See *id.* The legal argument that unauthorized use tends to increase the income of copyright owners has generally been rejected. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 n.21 (1994) (noting that even if a "film producer's appropriation of a composer's previously unknown song ... turns the song into a commercial success[,] the boon to the song does not make the film's ... copying fair"); *Ringgold v. Black Entm't Television*, 126 F.3d 70, 81 n.16 (2d Cir. 1997) ("Even if the unauthorized use of plaintiff's work in the televised program might increase poster sales, that would not preclude her entitlement to a licensing fee."); *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982); cf. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 497-98 n.6 (2001).

More to the point, even if the dissent is correct that some authors, in the long run, are helped, not hurt, by Database reproductions, the fact remains that the Authors who brought the case now before us have asserted their rights under § 201(c). We may not invoke our conception of their interests to diminish those rights.

Id. But see *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 571 (7th Cir. 2002) (dictum) ("Book reviews that quote from ('copy') the books being reviewed increase the demand for copyrighted works; to deem such copying infringement would therefore be perverse, and so the fair-use doctrine permits such copying."); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000); but cf. *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 607-08 (9th Cir. 2000) (finding fair use by competitor that produced video game consoles by reverse engineering plaintiff's copyrighted computer code, where plaintiff suffered harm in market for consoles but potential benefit in market for games).

243. See *Napster*, 239 F.3d at 1019.

244. 471 U.S. 539 (1985).

videotape was shot by an independent news-gathering organization and was broadcast simultaneously with its transmission by news stations under contract with the independent producer. The initial broadcasts were recorded, and tapes of the recordings were obtained and rebroadcast, at different times and by different parties, without compensation to the original producer. The plaintiff took three cases to the Ninth Circuit, prevailing in two of the three. The plaintiff won the two cases that appeared to involve legitimate "journalism," and lost the case involving use of the tape for promotional purposes, the case that initially appeared to support the weakest fair use defense.

In the first case, *Los Angeles News Service v. KCAL-TV Channel 9*,²⁴⁵ a competing local news station broadcast roughly thirty seconds of the four-plus minute videotape and was sued by the original producer for copyright infringement. The district court granted the defendant's motion for summary judgment, but the Ninth Circuit reversed, holding that the first factor, nature of the use, suggested that the defendant was effectively free-riding on the news-gathering efforts of the producer, rather than engaging in legitimate journalism, particularly since the defendant had asked the plaintiff for a license and had been refused.²⁴⁶ Further, the court found that the use took the "heart" of the original work and that the use, being commercial, presumptively injured the plaintiff's market for licensing the work.²⁴⁷

The same original work was before the Ninth Circuit again on a similar claim in *Los Angeles News Service v. Reuters Television International, Ltd.*,²⁴⁸ in which the defendants were accused of rebroadcasting the tapes to international subscribers after acquiring the images from an authorized broadcast on *The Today Show* on NBC. In this case, however, the district court, relying on the Ninth Circuit's earlier opinion, granted partial summary judgment in the plaintiff's favor with respect to the defendant's fair use defense.²⁴⁹ On appeal, the Ninth Circuit affirmed. The court dismissed the possibility that the defendant's use was anything other than commercial (distribution or broadcast of the footage in exchange for a

245. 108 F.3d 1119 (9th Cir. 1997).

246. *See id.* at 1121-22.

247. *See id.* at 1122-23.

248. 149 F.3d 987 (9th Cir. 1998).

249. *L.A. News Serv. v. Reuters Television Int'l Ltd.*, 942 F. Supp. 1265 (C.D. Cal. 1996).

fee),²⁵⁰ as well as the possibility that the uses to which the footage ultimately might be put were relevant in any sense to the fair use calculus.²⁵¹ The court discussed the remaining factors only briefly, tracking its earlier ruling that the defendant's activities injured the plaintiff's market in the sense that redistribution of the work without payment would damage the ability of independent producers such as the plaintiff to build a business.²⁵²

The plaintiff was less successful in a third effort to pursue infringement claims based on this footage, this time against the producers of the *CourtTV* television program, which incorporated several seconds of the original footage into its advertising of coverage of the trials of some of those accused of the beatings.²⁵³ In this case, the district court granted the defendant's motion for summary judgment, and the Ninth Circuit affirmed, holding that the defendant's use was indeed fair. The court ruled that the promotional use of the videotape was in fact more "transformative" than its mere rebroadcast in reporting on the news, despite its more obviously commercial context.²⁵⁴ The court found the heart of the distinction between this and the two prior cases in its analysis of the fourth factor, the effect of the use on the market for the work.²⁵⁵ The court noted that *CourtTV* was not a competitor of the plaintiff, unlike the defendants in the two prior cases, which were both in the news business.²⁵⁶ Further, the defendant made no effort to avoid paying a license fee, since the absence of a competitor or distributor relationship made a license structure for this kind of use unexpected.²⁵⁷ Most important, the court found that the record suggested no likely

250. *L.A. News Serv.*, 149 F.3d at 994.

251. *See id.* ("[T]he question of whether defendants' copying and transmission of the works constitutes fair use is distinct from whether their subscribers' broadcasts of the works are fair use.").

252. *See id.*

253. *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002), *amended*, 313 F.3d 1093 (9th Cir. 2003).

254. *See id.* at 938-39. The court noted that "[t]he development of the [advertising] montage at least plausibly incorporates the element of creativity beyond mere republication, and it serves some purpose beyond news worthiness." *Id.* at 939.

255. *See id.* at 939-40.

256. *Id.* at 942.

257. *Id.*

adverse impact on the character of the plaintiff's business if uncompensated use of this sort were permitted, even on a broader scale.²⁵⁸

d. Campbell and Parody: Dr. Seuss Enterprises v. Penguin Books and SunTrust Bank v. Houghton Mifflin Co.

Perhaps nowhere is the aridity of contemporary fair use analysis more apparent than in the courts' treatment of claims that a given use is protected "parody." In *Campbell v. Acuff-Rose Music, Inc.*,²⁵⁹ the court strongly suggested that a "parodic" use was likely to be fair, since it was more likely to constitute a "transformative" use under the first fair use factor.²⁶⁰ But the court seemed to draw a conceptual line between "parody" as protected use, on the one hand, and "satire," or use of the copyrighted work to criticize some unrelated phenomenon as an unprotected use, on the other hand.²⁶¹ In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*,²⁶² the owners of copyrights in the works of Dr. Seuss sued the publishers of a slim volume called *The Cat Not in the Hat* (a take-off on the Seuss titles *The Cat in the Hat* and *The Cat in the Hat Comes Back*), which satirized the criminal prosecution of O.J. Simpson for the murder of his wife.²⁶³ On appeal from a preliminary injunction entered in favor of the plaintiff, the Ninth Circuit rejected the defendants' fair use defense, drawing a definitive line between protected parody and unprotected satire, and finding that the defendants' work fell on the wrong side of that line.²⁶⁴ According to the court, the defendants' work invoked, but offered no critical commentary on, the content or

258. *Id.* at 941-42. For a comparable set of contrasting results regarding use of apparently similar material, compare *Roy Exp. Co. Establishment of Vaduz, Liechtenstein, Black Inc., A.G. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1143-47 (S.D.N.Y. 1980) (holding that broadcast of film clips of Charlie Chaplin in connection with broadcast on his death did not constitute fair use), *aff'd on other grounds*, 672 F.2d 1095 (2d Cir. 1982), with *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, No. 98 CIV. 7128 IBSJ, 2001 WL 1518264 (S.D.N.Y. Nov. 28, 2001) (upholding defense of fair use of movie clips in context of news report on death of actor Robert Mitchum). There is no doubt that Chaplin's career, and his death, were far more newsworthy than Mitchum's.

259. 510 U.S. 569 (1994).

260. See *supra* notes 204-05 and accompanying text.

261. See *Campbell*, 510 U.S. at 596-600 (Kennedy, J., concurring).

262. 109 F.3d 1394 (9th Cir. 1997).

263. *Id.* at 1396.

264. See *id.* at 1399-1401.

style of Dr. Seuss's classic books.²⁶⁵ It therefore involved no relevant transformation of that work. The court reiterated that sense in its evaluation of the second fair use factor, when it found the plaintiff's work to be creative and original,²⁶⁶ and the third factor, when it rejected as "post-hoc shtick" the notion that the amoral Cat could be recharacterized as the amoral O.J. Simpson.²⁶⁷ The defendants' nontransformative and obviously commercial use (commercial in the sense that the defendants were trying to sell books) permitted the court to affirm the district court's inference of market injury as a result of the use, and rejection of the fair use defense.²⁶⁸

By contrast, a comparable fair use claim was enthusiastically accepted in a case involving a "parody" of Margaret Mitchell's best-selling novel *Gone With the Wind*. A version of the book, narrated by a slave on the plantation Tara and entitled *The Wind Done Gone*, attracted a preliminary injunction based on copyright infringement in *SunTrust Bank v. Houghton Mifflin Co.*²⁶⁹ On appeal, the Eleventh Circuit reversed, finding that the defendant had established the fair use defense by invoking the work's transformative character.²⁷⁰ Rather than reject as "post-hoc shtick" the defendant's efforts to characterize her own work as a "parodic" invocation of *Gone With the Wind*'s romanticization of the antebellum South, the Eleventh Circuit embraced those efforts, along with an expansive interpretation of the *Campbell* standard requiring only that "a parodic character may reasonably be perceived" in order to rely successfully on the transformative character of the use.²⁷¹

III. FAIR USE TRADITIONS AND PATTERNS

Despite the small sample of cases reviewed in the last Part, the point should be clear that across a range of fair use cases, the Supreme Court's formal jurisprudence has encouraged the courts of

265. *See id.* at 1401.

266. *See id.* at 1402.

267. *See id.* at 1402-03.

268. *See id.* at 1403.

269. 136 F. Supp. 2d 1357 (N.D. Ga. 2001).

270. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

271. *See id.* at 1268-69 (requiring only that the defendant intend "to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work").

appeals, and presumably the district courts following their lead, to abstract the fair use inquiry to the point of incoherence. Looking solely at the courts' examination of the four fair use factors, there is no principled distinction in law between parodies (or satirical uses) of *Gone With the Wind* and *The Cat in the Hat*.²⁷² Indeed, the postmodern literary reverence for Dr. Seuss²⁷³ suggests that his work is *more* ripe for parody than Mitchell's faded classic. There is no principled distinction between "unfair" use of an obviously newsworthy videotape for news reporting purposes and the "fair" use of that same tape for advertising purposes. Based on the four factors, there is no principled distinction between fair and unfair uses of electronic devices for copying and storing digital copies of musical works. I do not argue that distinctions cannot be drawn, but only that they cannot be drawn credibly based on the language of the statute alone, as the Supreme Court has directed that the fair use statute be used, and as the courts have characterized their own work. To the extent that decisions have relied on fair use theorizing, theory has tended to reinforce this overall direction, rather than constrain it.²⁷⁴

In this Part I begin the process of undertaking a new direction for fair use, focusing closely on what the Supreme Court actually did in the key cases described above, as contextualized in the judicial background to the statute established in the nineteenth and early twentieth centuries. I suggest in this Part that the contemporary focus on "case-by-case" adjudication of fair use disputes misunderstands the properly contextual orientation of fair use decision making as it developed historically, as Congress understood it when it enacted the fair use statute, and as the statute has actually been applied over the last twenty-five years.

Recovering this contextual sense requires departing from the currently accepted focus on the plaintiff's "work of authorship" as the sole relevant cultural artifact. Instead it requires focusing on situating the work of authorship in the context of the cultural and

272. See *supra* Part II.C.5.d.

273. See, e.g., ALISON LURIE, *BOYS AND GIRLS FOREVER: CHILDREN'S CLASSICS FROM CINDERELLA TO HARRY POTTER* (2003) (deconstructing children's literature via the lives and personalities of the authors).

274. See *supra* notes 158 and accompanying text (noting reliance of courts in photocopying cases on market theory of fair use).

social patterns in which plaintiffs and defendants—both named individually and implicit as groups—are embedded.

A. Fair Use Traditions: Folsom v. Marsh and Nineteenth Century Copyright

Copyright scholars know that fair use is not timeless. As a formal concept, fair use dates to a pair of lower federal court decisions written in the middle of the nineteenth century by Justice Story, riding the circuit: *Folsom v. Marsh*²⁷⁵ and *Lawrence v. Dana*.²⁷⁶ Of the two, *Lawrence* is remembered chiefly for introducing the phrase “fair use” to the vocabulary of American copyright law.²⁷⁷ The more important of the two, *Folsom* gave us the syntax of fair use. In this Part, I propose to redescribe *Folsom*,²⁷⁸ noting that the features for which it is chiefly known—its formulation of what has come down to us as the four statutory fair use factors—are in fact less important than the narrative structures that Story used to frame his opinion. In the next Part, I suggest that modern fair use cases can and should be subjected to a similar interpretive inversion.

The plaintiffs in *Folsom* were the publishers of a twelve-volume compendium of the papers of George Washington, including both private and public material, letters, correspondence, and the like.²⁷⁹ The defendants published a two-volume work, *The Life of Washington in the Form of an Autobiography*, intended to be marketed to children and students.²⁸⁰ Most of the defendants’ work consisted of the story of Washington’s life ostensibly narrated by Washington, as to which there was no claim of infringement.²⁸¹ What prompted the suit was the defendants’ inclusion of verbatim copies of some of the letters included in the plaintiffs’ work in order to punctuate and illustrate the defendants’ “autobiography.”²⁸² As Story noted, al-

275. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

276. 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136).

277. *Lawrence*, 15 F. Cas. at 44.

278. I have done so once before, from a different perspective, in Michael J. Madison, *What’s My Copy Right?*, 48 J. COPYRIGHT SOC’Y OF THE U.S.A. 787 (2001).

279. *Folsom*, 9 F. Cas. at 343.

280. *Id.*

281. *Id.* at 345.

282. *Id.*

though the quantity of material copied was relatively slight, both in relation to the original work and in relation to the defendants' work:

It is a selection of the entire contents of particular letters, from the whole collection or mass of letters of the work of the plaintiffs. From the known taste and ability of Mr. Upham, [the author of the accused work] it cannot be doubted, that these letters are the most instructive, useful and interesting to be found in that large collection.²⁸³

Did the defendants' copying thus infringe the plaintiffs' copyright? To the modern reader, Story's decision that it did follows from application of the nineteenth century version of the four statutory factors:

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.²⁸⁴

Reading the case in its entirety, however, makes clear that the factors were neither drawn from an abstract sense of the plaintiff's "property" interest or of the market for the original work, nor applied as such. The defense, as considered by Story, was more nuanced. Story reviewed several possibilities, rejecting each in turn. First, the defendants' work might have been considered to be an abridgment of the plaintiffs'.²⁸⁵ If so, it would have been lawful, for under the law as it existed at the time, "abridgment" was not an exclusive right of the copyright owner.²⁸⁶ Alternatively, it might have been a compilation of the plaintiffs' work and as such it would constitute a fair restatement and not a piracy.²⁸⁷ As Story explained, "[a] compilation of this kind (an encyclopedia) may differ from a treatise published by itself; but there must be certain limits fixed to

283. *Id.* at 348.

284. *Id.*

285. *Id.* at 344-45.

286. *See id.* at 344-47; *see also* PATRY, *supra* note 97, at 3-27 (analyzing early "fair use" and "fair abridgment" decisions in English and American law).

287. *Folsom*, 9 F. Cas. at 347-48.

its transcripts; it must not be allowed to sweep up all modern works, or an encyclopedia would be a recipe for completely breaking down literary property.²⁸⁸ What Story referred to as “a collection of beauties of an author”²⁸⁹ was his third attempt at characterization; such a defense likewise would have failed, for the defendant would have appropriated merely the most valuable of the plaintiff’s work and have added nothing of his own.²⁹⁰ The facts of this case, however, fell somewhere between these extremes, since Story acknowledged that the defendant author had copied letters from the plaintiffs’ work in the context of a longer narrative of Washington’s life.²⁹¹

Story focused on two meaningful possibilities, either of which, it is clear, would have exonerated the defendants. The first was “that the defendant ha[d] selected only such materials, as suited his own limited purpose as a biographer.”²⁹² From this premise, Story rendered his now-famous discussion of the character of the material copied, the value of that material in the context of the original work, and the extent to which that copying was likely to diminish the profitability of the original. He concluded implicitly, but clearly, that crediting the biographical motives of the defendant was more than a little disingenuous; a true biography (and a true biographer) would not have been intended nor would it in fact substitute for a collection of primary source materials authored by the subject.²⁹³ But asking whether a given author is “really” a biographer, or whether that author’s work product is “really” a biography, is difficult.²⁹⁴ In context, it is clear that Story elucidated his “factors” for fair use as a proxy for determining whether the defendants’ work was “really” a biography.

288. *Id.* at 348 (quoting *Roworth v. Wilkes*, 170 Eng. Rep. 889, 890 (K.B. 1807)).

289. *Id.*

290. *Id.* at 347-48.

291. *See id.* at 345.

292. *Id.* at 348.

293. *See id.* at 348-49.

294. The art of biography goes back to antiquity, but until relatively recently it was used more as a device to memorialize, commemorate, and morally instruct readers (and listeners) than to narrate the events of a person’s life. The word “biographer” (from the Greek “bios”—life and “graphein”—to write) was introduced in THOMAS FULLER, *THE HISTORY OF THE WORTHIES OF ENGLAND* (1662) (arguing for a more “objective” or critical style of writing), and “biography” was first used by John Dryden in 1683, writing about Plutarch. *See* CATHERINE N. PARKE, *BIOGRAPHY: WRITING LIVES* 13-14 (1996).

The same conclusion comes through clearly in the second category to which the defendants' work arguably belonged—the review. The defendants might, in theory, have been reviewing or critiquing the plaintiffs' work, rather than reviewing Washington's life. If so, they were entitled to present quotations from the work, but only to the extent that doing so was consistent with the reviewer's purpose.²⁹⁵ Otherwise, the defendants would not have produced a review (which would be fair) but "in substance a copy, whereby a work vested in another is prejudiced."²⁹⁶ "[N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism."²⁹⁷ Again, the economic injury worked by an effective substitution served as an analytic proxy for the determination of whether or not the defendants' work constituted a "review": "It is not a case, where abbreviated or select passages are taken from particular letters; but the entire letters are taken"²⁹⁸

295. *Folsom*, 9 F. Cas. at 348 (quoting *Roworth v. Wilkes*, 170 Eng. Rep. 889, 890 (K.B. 1807)). The Nimmer treatise describes a similar "functional test" for evaluating the fourth statutory fair use factor, under which "a comparison must be made not merely of the media in which the two works may appear, but rather in terms of the function of each such work regardless of media." NIMMER ON COPYRIGHT § 1305(B)(1), at 192-93. The "function" of each version of the work is determined by the use to which the author apparently intends the audience should put the work. *See id.* It is unclear, however, how this "functional" test (based on the "intended" use of the original work) avoids the circularity of market-oriented fair use analysis that arises in cases when failure to secure the author's permission weighs against a claim of fair use. *See supra* notes 157-58 and accompanying text.

296. *Folsom*, 9 F. Cas. at 348 (quoting *Roworth*, 170 Eng. Rep. at 890).

297. *Id.* at 344.

298. *Id.* at 349. At this point in the opinion, the court's economic logic runs away a bit from its focus on the practice of biography and review:

But if the defendants may take three hundred and nineteen letters, included in the plaintiffs' copyright, and exclusively belonging to them, there is no reason why another bookseller may not take other five hundred letters, and a third, one thousand letters, and so on, and thereby the plaintiffs' copyright be totally destroyed.

Id. This passage may be read innocently, as reaffirming what had already been stated. If each of these hypothetical copyists were acting under mere "pretense" of biography or review, then each, individually, should be held liable as an infringer, because the economic injury from each would be clear and there would be no need to aggregate the injury as the court hypothesizes. On the other hand, each of the hypothetical copyists might establish copying in the service of legitimate biography—though the court was skeptical that wholesale copying could thus be justified—and in that case, the economic injury presumably would be subordinate to the biographer's interest.

It is true, as others have noted,²⁹⁹ that *Folsom* did not confront or, in its four-factor formulation, appear to try to capture the broad variety of potential fair “uses” that courts and copyright communities have wrestled with during the twentieth century and into the twenty-first. If *Folsom* were taken solely for its four-factor contribution, then it is fair to criticize the case—and courts and Congress, to the extent that they have relied on it—for its narrowness. Here, however, I suggest that Story’s method was both broader and more contextual than is commonly understood.³⁰⁰ If the four factors do not stand alone, but instead substitute analytically, when necessary, for the related but prior question of the character of the defendant’s practice, then that analytic technique transcends the facts of *Folsom* and related cases involving “biography” and “review.” The practice of biography or review in this instance was not a label to attach to a successful defense, but the crux of the case itself.

This reversal of perspective can be seen both in the English antecedents of *Folsom*, and in the nineteenth century cases that elaborated on Story’s analysis. The leading prior English case is *Cary v. Kearsley*,³⁰¹ decided in the King’s Bench in 1802. The plaintiff and the defendant were each authors of books (really surveys) of roads. On the question of infringement, Lord Ellenborough stated the issue broadly as “Was the matter so taken used fairly with that view [for the promotion of science and the benefit of the public], and without what I may term the *animus furandi* [in effect, an intent to pirate]?”³⁰² and more narrowly, in this case, as

whether what [was] so taken or supposed to be transmitted from the plaintiff’s book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken

299. See Okediji, *supra* note 14, at 119-20.

300. See, e.g., L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431 (1998) (criticizing Story for applying natural law concepts to statutory copyright, in order to expand the author’s right). Though the American doctrine of “fair use” was in many respects a narrowing of the English doctrine of “fair abridgement,” even in English cases the law had already begun a shift in favor of the author. See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 18-25 (1967).

301. 170 Eng. Rep. 679 (K.B. 1802).

302. *Id.* at 680.

colourable, merely with a view to steal the copy-right of the plaintiff?³⁰³

That is, the defendant was either a compiler in the sense that the defendant arranged the underlying public information in some manner of his own design, or not a compiler, in which case he merely appropriated the arrangement offered in the plaintiff's work.³⁰⁴

The concept of *animus furandi* concerned both English and American courts for decades and comes down to modern American copyright cases in the notion that a successful fair use defense must incorporate credible evidence of "good faith."³⁰⁵ In the context of *Cary*, however, it seems clear that Lord Ellenborough intended that element as a proxy for the same kind of practice examination that Story pursued in *Folsom*. Based on the excerpt above from *Cary*, the counterpart to *animus furandi*, sometimes referred to as a requirement that the defendant have made a "productive" use of the plaintiff's work and sometimes expressed in early English cases as the notion that the successful defendant was engaged "in the fair exercise of a mental operation,"³⁰⁶ had a similar function.

Lord Ellenborough had applied the approach relied on in *Folsom* in *Roworth v. Wilkes*,³⁰⁷ a case in which the publisher of an encyclopedia copied under the letter "F" most (but not all) of the plaintiff's pamphlet on fencing. William Patry discusses the case as demonstrating that good faith, or the lack of intent to infringe, does not insulate a defendant from an injunction, if the defendant has not

303. *Id.*

304. There was no holding on the merits. "The counsel for the plaintiff consented to be nonsuited." *Id.*

305. See PATRY, *supra* note 97, at 130 (noting English antecedent of modern "good faith" requirement); Okediji, *supra* note 14, at 121-22 (arguing that at common law, the "good faith" concept embodied both the concern that the defendant not have intended to deprive the plaintiff of the value of his copyright, and the concern that the defendant genuinely have intended to produce a work for the benefit of the public).

306. See *Wilkins v. Aikin*, 34 Eng. Rep. 163, 165 (K.B. 1810). Patry criticizes the English cases to the extent that they appear to ascribe value to the labor implicit in the defendant's "mental operation." See PATRY, *supra* note 97, at 10 n.17. The notion, however, may well not have been (wrongly) to associate a virtuous defendant with a hard-working defendant, but instead to associate a virtuous defendant with a particular virtuous practice. In that sense, fair use has departed from its historical moorings. More recent discussions of "productive" use appear to focus more on the defendant's product. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477-81 (1984) (Blackmun, J., dissenting).

307. 170 Eng. Rep. 889 (K.B. 1807).

added material such that a new work has been created.³⁰⁸ This is accurate up to a point; the issue was what the defendant had done, not what the defendant intended to do. Lord Ellenborough wrote that "[a] Review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property."³⁰⁹

In modern terms, the conventional reading of such a statement would be that a review cannot go so far as to damage the market for the original.³¹⁰ A more accurate reading would be that the courts were arguing that a review that goes so far is no review at all, for reviews by their character and the manner of their preparation complement, rather than substitute for, the works reviewed. The point was not to investigate complementarity or substitution, but to investigate the genuineness of the review.

Other American fair use cases of the nineteenth century were decided in the same way. In *Gray v. Russell*,³¹¹ enjoining publication of a pirated version of a Latin grammar, Story wrote, "[I]f large extracts are made ... in a review, it might be a question, whether those extracts were designed bona fide for the mere purpose of criticism, or were designed to supersede the original work under the pretence of a review, by giving its substance in a fugitive form."³¹²

In *Story v. Holcombe*,³¹³ Justice McLean enjoined publication of commentaries on equity copied substantially from Justice Story's work. McLean expressed his skepticism of the defendant's claim by considering it as a form of review, indicating that quotation "may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work,"³¹⁴ and further considering it as a compilation, indicating that extracts cannot "be extended so as to convey the same knowledge as the original work"³¹⁵ if they use the plaintiff's plan and arrangement.

308. See PATRY, *supra* note 97, at 12.

309. Roworth, 170 Eng. Rep. at 890. Story quoted this sentence in his opinion in *Folsom*. See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

310. See *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002).

311. 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5728).

312. *Id.* at 1038.

313. 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13,497).

314. *Id.* at 173.

315. *Id.*

*Campbell v. Scott*³¹⁶ rejected a fair use defense offered by a defendant who included lengthy verbatim extracts of the plaintiff's poems in a book that included an essay on poetry and biographies of poets whose works were included. The court noted, "If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them and shew from whence [the plaintiff] had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism."³¹⁷

In *Lawrence v. Dana*,³¹⁸ the case that introduced the phrase "fair use" to American copyright law,³¹⁹ the court rejected the fair use defense where the defendant had copied and republished much of an annotated volume on international law. As in the cases above, the defendant failed to show that his extraction and reuse was in the pursuit of any credible claim that he, himself, had engaged in a process of collection and annotation.³²⁰ The defendant might have produced a competing volume of annotated international law, and might even have used the plaintiff's source materials in doing so, so long as his "plan and arrangement" were novel to him. That process would make him the author of a new annotated work, rather than an infringer.³²¹

316. 59 Eng. Rep. 784 (K.B. 1842).

317. *Id.* at 787. English law in turn re-absorbed *Folsom's* borrowing from *Cary v. Kearsley*, 170 Eng. Rep. 679 (K.B. 1802), and other prior cases. In *Scott v. Stanford*, 3 L.R.-Eq. 718 (1867), the court rejected a fair use defense in a case where the defendant copied (with acknowledgment) large portions of the plaintiff's work in preparing a different version of a book recording mining activity in England. Rejecting the claim that the defendant, an employee of the Museum of Practical Geology, was engaged in scientific research, the court noted that the defendant had gone to none of the trouble that the plaintiff had incurred. The plaintiff was a scientist; the defendant was not. (It is important to distinguish this analysis from a general theory of copyright that assigns interests based solely on a labor theory of value. The defendant in *Scott* lost not because the plaintiff had invested valuable labor and the defendant had not. The defendant in *Scott* lost because the defendant was not acting in a scientific mode, as the plaintiff had done.)

318. 15 F. Cas. 26 (C.C.D. Mass. 1869) (No. 8136).

319. *Lewis v. Fullarton*, 48 Eng. Rep. 1080, 1080-81 (K.B. 1839), used the term in English law in 1839.

320. *Lawrence*, 15 F. Cas. at 58.

321. To the same effect are the decisions in *Reed v. Holliday*, 19 F. 325, 325-27 (C.C.W.D. Pa. 1884) (rejecting fair use defense raised by author of teacher's manual for plaintiff's textbook; analogizing defendant not to an educator but to an inventor who improves a patented machine and claims a right to use the original invention); *Farmer v. Elstner*, 33 F. 494, 497 (C.C.E.D. Mich. 1888) (enjoining publication of pamphlet derived from historical

Particularly clear illustrations of holdings to the same effect are found in two cases involving allegedly infringing use of the plaintiff's copyrighted digests of legal decisions: *West Publishing Co. v. Lawyers' Co-operative Publishing Co.*³²² and *Edward Thompson Co. v. American Lawbook Co.*³²³ In the former, the court rejected the fair use defense. The defendant, in its digesting practices, failed to distinguish between output of its own devising and that which it copied from the plaintiff.³²⁴ The process was the focus of the court's concern: not merely the labor saved as a result of reliance on the plaintiff's work, but also the lack of genuineness about the character of what the defendant had actually done. The defendant in *Edward Thompson Co.*, on the other hand, succeeded with the fair use defense, in no small part because the defendant successfully described the process by which it acquired source materials and ultimately produced its digests.³²⁵

B. How the Adoption of § 107 Did Not Change the Law

The Supreme Court has made much of statements in the legislative history to § 107 that codifying the fair use doctrine was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."³²⁶ From this statement,

treatise on Detroit, Michigan; "There is no pretense that the compiler of this publication resorted to the original sources himself for this information, nor that he procured it from any other source than the plaintiff's book." The defendant, in other words, was no historian.); and *Simms v. Stanton*, 75 F. 6 (C.C.N.D. Cal. 1896) (finding fair use by defendant, author of books on physiognomy, of the plaintiff's works on the same subject).

William Patry criticizes the court's reasoning in *Simms*. See PATRY, *supra* note 97, at 39-40 (hypothesizing that the court implicitly understood that both parties necessary relied on much of the same information). One need not be so skeptical; the court treated potential economic injury to the plaintiff, which it found insufficient, to be a valid proxy for whether the defendant had engaged in "a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources." *Simms*, 75 F.6 at 9 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436)). The court engaged in the analytic exercise that I propose be generalized today, using market effect, among other things, to test whether the defendant was participating in the pattern that it claimed to be.

322. 79 F. 756 (2d Cir. 1897).

323. 122 F. 922 (2d Cir. 1903).

324. *West Publ'g Co.*, 79 F. at 762-63.

325. *Edward Thompson Co.*, 122 F. at 922-23.

326. H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975). The Court quoted this language in each of its last three major fair use decisions. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*,

the Court has concluded that the “equitable” nature of the doctrine renders it incapable of precise definition except by reference to the four factors stated in the statute.³²⁷ As the House Report that accompanied the final bill put the matter,

Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107³²⁸

The formal factor-based reasoning of the Court in *Sony*, *Harper & Row*, and *Campbell* thus relies heavily on this approach and resists efforts to develop into a principled doctrine of fair use.

There is more to the legislative history than this, however. Congress left the matter less open-ended than these quotations make it appear. Congress codified the fair use doctrine at least in part in order to encourage courts to render the doctrine more comprehensible. The House Report, for example, notes that the doctrine, as such, is not stated in the four factors themselves, but in the first sentence of § 107—what has come to be referred to as the preamble. According to the House Report, “[t]hese criteria [the four factors stated in the statute] are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case.”³²⁹ This basic statement—that the four factors implement the doctrine, rather than define it—gives courts a contextual standard by which application of the four factors can be measured. That standard is coupled with the statement later in the House Report:

The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doc-

471 U.S. 539, 549 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984).

327. See *supra* Part II.A.3.

328. H.R. REP. NO. 94-1476, at 65.

329. *Id.*

trine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.³³⁰

As Jay Dratler noted in an early commentary on *Sony* and *Harper & Row*, this language suggests that it is wrong for courts (or scholars) to conclude that fair use was intended by Congress to remain an open-ended invitation to fact-and case-specific equitable balancing:

In any event, one thing is manifest in both the statute and its legislative history: Congress intended to replace the witches' brew of equity and ad hoc policy balancing with more finely refined elixirs, but without curtailing development of the doctrine in the common law tradition. Now that the fair use doctrine has been codified, equity and policy cannot be the sole basis for decision, or even a first resort.³³¹

330. *Id.* at 66. The Senate Report contains the counterpart definitional sentence, "In any event, whether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence." S. REP. NO. 94-473, at 62. William Patry argues that the House Report is misleading in its characterization of the first sentence of § 107 as representing "the" doctrine of fair use, and that the Senate Report more accurately describes fair use as embodied in the four factors themselves. See PATRY, *supra* note 97, at 363-64. The argument may prove too much, on two grounds. First, as I have suggested, the historical doctrine of fair use was less tethered solely to the four factors than Patry argues. Second, under my reading of § 107, the Senate Report and the House Report are consistent with one another. The first sentence describes the scope of the doctrine as a whole (in the pattern-oriented sense that I argue had developed in the cases); the four factors describe how to situate a particular case with reference to that scope. At the very least, Congress made clear in enacting the statute that the list of illustrative types of fair use was relevant in considering all four of the fair use factors, not merely the first. A formal proposal for an overall model of fair use along these lines appears in M.B.W. Sinclair, *Fair Use Old and New: The Betamax Case and Its Forebears*, 33 BUFF. L. REV. 269, 328-31 (1984); cf. Okediji, *supra* note 14, at 164:

Where the purpose and character of use is consistent with the nature of the medium, fair use should provide protection. Thus, the evolving norms of cyber-behavior such as linking, forwarding, browsing, and in some circumstances caching—all potential infringements under copyright law—would be excluded from the reach of claims of infringement.

331. Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 260 (1988).

But Dratler may have been overly sanguine in his assessment of the four factors themselves as giving courts the needed tools to develop a common law of fair use.³³² Abstracting these factors from the contexts in which they were developed may have misled courts into concluding that context was not relevant. Congress was well aware of its relevance, beginning with its earliest efforts, nearly twenty years before the revision bill was passed in 1976, to enact a comprehensive update of the copyright statute.

Among the "Studies on Copyright" commissioned by Congress,³³³ the study on *Fair Use of Copyrighted Works*³³⁴ reviewed the case law of fair use by characterizing it as "The Problem in Context,"³³⁵ and breaking the cases down into eight categories of uses: incidental use, review and criticism, parody, scholarship, personal or private use, news, use in litigation, and use for nonprofit or government purposes.³³⁶ The study drew a conclusion that relies ultimately on the same foundation as my own. Its author concluded that fair use could be analyzed according to the question, "[W]ould the reasonable copyright owner have consented to the use?"³³⁷ "Reasonableness" would be determined, in part, by customary practice.³³⁸ Neither the history

332. In an earlier article, I shared some of his optimism. See Madison, *Legal-Ware*, *supra* note 18, at 1138-42 (proposing adoption of a statutory mandate that fair use claims be adjudicated in accordance with principles of common law decision making).

333. The legislative process that produced the 1976 revision lasted for more than twenty years. It would be an error, as Jessica Litman has demonstrated so vividly, to overlook the effects of political economy on the result or to assign too much weight to its legislative history as reflecting genuine congressional intent. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

334. ALAN LATMAN, STUDY NO. 14, FAIR USE OF COPYRIGHTED WORKS (1958), reprinted in 2 STUDIES ON COPYRIGHT 781 (Arthur Fisher Memorial Edition 1963).

335. *Id.* at 785.

336. See *id.* at 786-92.

337. *Id.* at 793.

338. See *id.* at 785, 793. The idea of fair use as a "customary" right influenced some pre-1976 commentary. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550-51 & n.4 (1985) (citing older commentary that referred to fair use as "reasonable and customary"); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (1973) (suggesting that a scholar's handwritten copy of copyrighted article would be fair use as a "customary fact[] of copyright-life"); Saul Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 50-51 (1955); Harry N. Rosenfield, *Customary Use as "Fair Use" in Copyright Law*, 25 BUFF. L. REV. 119, 128-40 (1975); Elizabeth Filcher Miller, Case Note, 15 S. CAL. L. REV. 249, 250 (1942). Older cases and commentators evidenced hostility to copyright defendants' efforts to rely on custom and usage to avoid liability for infringement. See *Famous Music Corp. v. Seeco Records, Inc.*, 201 F. Supp. 560, 566 (S.D.N.Y. 1961) (declining to excuse defendant from compliance with terms of compulsory license statute); EATON S. DRONE, A

of fair use as I have recast it above nor copyright policy support posing the question of consent from the standpoint of the copyright owner, but the study put the question of context clearly in front of Congress.

The 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* likewise characterized fair use in contextual terms. The Report described the judicial doctrine of fair use as providing “that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner’s market for his work.”³³⁹ That the Report framed its summary in terms of “reasonableness” and “legitimacy” confirms the importance of context in its articulation of the history of fair use and therefore in the material that Congress was relying on when it passed § 107.³⁴⁰

To conclude that Congress was speaking contextually rather than abstractly in § 107 is not to argue that Congress necessarily had any particular contextualizing methodology in mind, or that any such methodology is required by the text of the statute. What we do know

TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 506 (1879); ARTHUR W. WEIL, *AMERICAN COPYRIGHT LAW* 430-31 (1917). That theme continues, in some courts, to the present. See *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 211-12 (3rd Cir. 2002), cert. denied, 123 S. Ct. 2075 (2003). But see *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1263 (2d Cir. 1986); *Rosemont Enters., Inc. v. Random House*, 366 F.2d 303, 307 (2d Cir. 1966) (both suggesting that customary practices of biographers warrant recognition in fair use context); Fisher, *supra* note 15, at 1678-82 (recognizing occasional use of “industry custom” in fair use cases but arguing that its value is limited to industry-specific contexts). One problem with “custom” as an analytic tool is that the quantum or type of evidence necessary to sustain a claim of “custom” is rarely defined adequately. The extensive debate prior to enactment of § 107 over the scope of fair use for educational photocopying illustrates the point well. The House Report included a lengthy explanation of the background of the debate over photocopying and of the compromise reached that enabled the bill to pass, as well as a set of nonbinding “guidelines” for classroom photocopying that has proved controversial ever since—due to the fact that the guidelines were developed before there existed any common sense of what classroom photocopying might involve. See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 688-89 (2001).

339. See 1961 REPORT, *supra* note 111, at 24.

340. The Report then illustrates the scope of fair use with examples of permitted uses that closely parallel the list of “favored” uses listed in the preamble to § 107. See *supra* notes 108-10 and accompanying text. Both this list, and the categories described in the 1958 Study, see LATMAN, *supra* note 334, focus less on the characteristics of the original work of authorship and a subsequent work that relied on it, and more on the character of the accused infringer’s activities.

from the legislative history suggests that the abstract approach adopted on the surface of the Supreme Court's (and later appellate) opinions is at odds with this history, as well as with the judicial tradition. The Supreme Court may be incorrect to conclude that fair use must remain open-ended, but correct to emphasize that Congress intended not to change its underlying conceptual framework. The next section argues that a better reading of *Sony*, *Harper & Row*, and *Campbell* reconciles these cases with congressional intent and with the judicial tradition that began with *Folsom v. Marsh*.

C. The Judicial Response Revisited

In this section I return to the Supreme Court's fair use opinions, in order to show that the analytic approach evident in the nineteenth century cases, if not frequently recognized as such, remains alive today under § 107. Discussion of the large number of appellate fair use cases decided after 1978 is reserved to the next Part.

Before proceeding further, some points should be restated. First, my argument is not that courts, from *Folsom* onward, were aware of their apparent practice of deciding cases in one way but describing their decision making in another way. Second, I do not suggest that in so doing, courts were indulging unprincipled and instinctive biases for and against certain kinds of expression or creativity. Instead, they were, as I describe in more detail in the next Part (but highlight here for clarity), following instinctive but undeveloped senses of social and cultural patterns.

In this section, I argue that the Supreme Court has followed much the same course in its major fair use opinions, describing its analysis in the framework of the four factors but in fact developing a jurisprudence of social and cultural patterns. In Part IV, I generalize this framework across the breadth of fair use cases decided in the courts of appeal during the last twenty-five years. In Part V, I suggest that this reinterpretation of the law is both better suited to the predictive function of copyright and better aligned with the creativity-inducing function that lies at the core of copyright's incentive policies.

As I previously described *Folsom v. Marsh* as a case about the narrative of the defendant's activity, below I similarly redescribe the major fair use opinions of the late twentieth century.

1. *Sony Corp. of America v. Universal City Studios, Inc.*

A reconstruction of the Court's opinion in *Sony Corp. of America v. Universal Studios, Inc.*³⁴¹ suggests that the case is far less telling about the scope of the fair use doctrine than might otherwise appear. The relevant context and narrative of the case focused not on use (fair or otherwise) of the plaintiff's copyrighted works, but on the patterns and practices surrounding the VTRs sold by the defendant.

As noted above, in deciding whether or not Sony infringed indirectly by selling VTRs capable of recording broadcast television programs, the majority opinion indulged a lengthy analysis of whether "time-shifting" by VTR users constitutes fair use.³⁴² While this result has an intuitive appeal, especially to consumers now inured to VTR viewing habits, the Court's formal fair use reasoning has been criticized for both its substantive emptiness in the context of the fair use doctrine³⁴³ and for its relatively slapdash approach to the realities not only of the VTR marketplace but of VTR use. As Paul Goldstein has noted, the four Justices who dissented on the ground that "time-shifting" did not meet their criteria of "productive" fair use were convinced, until late in the deliberative process, that theirs would be the majority opinion.³⁴⁴

It is the second of these criticisms, dealing with the character of VTR use, that I wish to focus on here. The now well-known explosion of consumer interest in VTRs occurred almost immediately following the decision in *Sony*,³⁴⁵ suggesting almost before the ink was dry on the opinion that the Justices had been unable to give appropriate weight to the ways in which VTRs were being used and could have been used. At the trial level, both parties introduced surveys purporting to show how VTR users were using their machines and concluding that "time-shifting" was the dominant use.³⁴⁶

341. 464 U.S. 417 (1984).

342. See *supra* notes 183-84 and accompanying text.

343. See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 65 (1987) ("Sony and Harper & Row are more sound in their results than in their reasoning.")

344. See GOLDSTEIN, *supra* note 165, at 149-56.

345. See JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE VCR, 312-28 (1987) (describing history of the videocassette recorder).

346. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 438-39 (C.D.

Both surveys were conducted in 1978, six years before the Supreme Court's opinion was released. What consumers were doing with VTRs in 1984 was anyone's guess.

The opinion is noteworthy, then, for its apparent failure to grapple with what was really the key fair use question before it. Embedded in the Court's opinion is an account of the manner in which VTRs were being absorbed by a relevant population of television viewers, and more particularly, of the manner in which a given VTR was absorbed in the experience of a given viewer. The Court described the capabilities of each VTR.³⁴⁷ The Court recounted the results of the parties' surveys regarding the dominant uses of each consumer's VTR: a significant majority of the respondents surveyed by the plaintiff indicted that they continued to watch as much television after acquiring a VTR as they watched previously, and the survey commissioned by the defendant did not suggest evidence of decreased viewing.³⁴⁸ At trial, Sony offered direct testimony of individual VTR users (who were named as nominal defendants by the plaintiff in order to procure favorable testimony), who testified to a range of taping habits, including time-shifting for convenience, time-shifting in order to avoid watching television commercials, and building libraries of recorded tapes.³⁴⁹

But would taping of broadcast programming by an individual television viewer—given that contextual evidence—constitute copyright infringement in any case? That is, would the individual television viewer exercise one of the exclusive rights reserved to the copyright holder by recording a broadcast television program without the holder's permission?

The court of appeals, which ruled in the plaintiff's favor, found that it would. The Supreme Court was silent on this point, although the conclusion is implicit in the overall framework of its opinion. But the omission is telling. The Court did not clearly state that the home tapper is an infringer but for the broadcaster's authority or an applicable defense. It skipped ahead, to the presence of authorized copying and to the conclusory (but ultimately determinative) statement that "the District Court's findings plainly establish that time-

Cal. 1979).

347. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 422-23 (1984).

348. See *id.* at 423-24 & nn.4-5.

349. See *id.* at 423-24; *Universal City Studios*, 480 F. Supp. at 437-38.

shifting for private home use must be characterized as a noncommercial, nonprofit activity.³⁵⁰ More particularly, and despite the Court's account of the evidence, it appears that the majority of the Court did not much care what the typical VTR user did with the machine. To be sure, the Court colored its fair use analysis with asides that "time-shifting" might yield broader distribution of copyrighted works and societal benefits in general,³⁵¹ but possible offsetting economic losses were dismissed as speculative.³⁵² Its factor-based fair use analysis just does not withstand scrutiny.

Instead, the Court's result can be explained easily by its clear sense that whether the viewer's "use" of the televised "work" is fair or not, the use of the machine is clearly legitimate. That analysis emerges from two facets of the majority opinion, its reliance on patent law for the "substantially noninfringing use" standard used to exonerate Sony, and its rejection of the dissent's proposed "productive use" standard for determining whether "time-shifting" is fair use of televised programming. As to reliance on patent law, the Court noted: "When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated."³⁵³ Going further, "[i]t seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively ... the exclusive right to distribute VTR's simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim."³⁵⁴

In the dissent, four Justices took the majority to task for failing to apply what they discerned as the principle of "productive" use that unifies the fair use statute and the tradition of judicial fair use

350. *Sony Corp.*, 464 U.S. at 449. Elsewhere the Court quotes the district court's findings regarding "time-shifting" as the dominant use of the VTR. *See id.* at 424 n.4. The district court found home recording and playback "of audiovisual material broadcast free of charge to Betamax owners over public airwaves ... is noncommercial and does not reduce the market for plaintiffs' works." *Universal City Studios*, 480 F. Supp. at 456. The district court held, as an independent ground for its decision, that Sony would not be liable for secondary copyright infringement even if use of the VTR for home taping were considered an infringing use. *See id.* at 446.

351. *See Sony Corp.*, 464 U.S. at 454.

352. *See id.*

353. *Id.* at 440.

354. *Id.* at 441 n.21.

before it.³⁵⁵ The relevant practice, in other words, was not the sale of the VTR by a manufacturer and vendor that had no ongoing relationship with each purchaser, but the dynamic that occurs (or, to the dissent, that fails to occur) in the VTR owner's living room.

The dissent's analysis of the issue began, then, not with the sale of the VTR to the individual, but with the making of an unauthorized copy: "[T]he VTR user produces a material object from which the copyrighted work later can be perceived. Unless Congress intended a special exemption for the making of a single copy for personal use, I must conclude that VTR recording is contrary to the exclusive rights granted by § 106(1)."³⁵⁶ The dissent then dealt with what it considered the heart of the matter—the reproduction (as opposed to the performance, or display, or other use)³⁵⁷ of the copyrighted television programming, even in the privacy of the home. It rejected the possibility that there is a statutory or common law basis for an exemption for "personal" or "private" use, and more importantly, it rejected the notion that there should be such an exemption. "Each of [the uses described in § 107 and the fair use case law] ... reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work."³⁵⁸

To the dissent, in short, the relevant pattern or practice was the use of the work itself, rather than the acquisition of the VTR. The dissent drew a sharp distinction between the "researcher" and the "scholar," on the one hand, and the "ordinary user," on the other. The television viewer recording programming with the VTR fell categorically into the latter group. To the dissent, "[t]he making of a videotape recording for home viewing is an ordinary rather than a productive use of the studios' copyrighted works."³⁵⁹

2. Harper & Row, Publishers, Inc. v. Nation Enterprises

As Glynn Lunney noted recently, the ostensible fair use rationale of *Sony*—excusing possible infringement because of a lack of evi-

355. See *id.* at 477-81 (Blackmun, J., dissenting).

356. *Id.* at 464 (Blackmun, J., dissenting).

357. *Id.* at 469 n.19 (Blackmun, J., dissenting).

358. *Id.* at 478 (Blackmun, J., dissenting).

359. *Id.* at 480 (Blackmun, J., dissenting).

dence of economic injury—has been the undoing of that case as precedent.³⁶⁰ What might have been taken as a strong judicial statement on the character of the individual defendants' activity instead has been taken as a signal to focus extensively on market concerns. In a different respect, however, that Court's approach set a tone that has been followed in each of the later Supreme Court opinions addressing fair use: formal attention is paid to the four factors of the statute, and to comparative characterization of the relevant works prepared by plaintiffs and defendants. But significant—even determinative, albeit unrecognized—weight is given to how the Court characterizes the relevant pattern or practice before it. The question the Court has in fact answered has been: "What are the defendants doing?," rather than "What have the defendants produced?"

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,³⁶¹ *The Nation* magazine published a short column detailing certain paraphrases and a handful of brief quotations from the about-to-be-published memoir of former President Gerald Ford. Virtually all of the quotations concerned circumstances surrounding President Ford's decision to pardon his predecessor, Richard Nixon.³⁶² Harper & Row, the publisher of the memoir, had authorized the appearance of pre-publication excerpts in *Time*.³⁶³ The victim of a journalistic scoop,³⁶⁴ *Time* declined to go forward with publication of the authorized ex-

360. See Lunney, *supra* note 14, at 985-91.

361. 471 U.S. 539 (1985).

362. See *id.* at 543. *The Nation's* 2250-word article consisted of "quotes, paraphrases, and facts drawn exclusively from the manuscript." *Id.* Three hundred of those words consisted of quotations from President Ford's memoirs, which the Court characterized as the "heart" of President Ford's manuscript. *Id.* at 564-65.

363. See *id.* at 542-43. *Time* had paid \$12,500 to Harper & Row already and had promised to pay an additional \$12,500 upon publication of the excerpt. *Id.*

364. See *id.* at 543, 562. The Court characterized the manuscript itself, in the hands of *The Nation*, as "purloined." *Id.* at 542. The norms and ethics of journalists have been of concern to the Court at least since *International News Service v. Associated Press*, 248 U.S. 215, 245-46 (1918) (establishing limited liability of news service for misappropriation of competitor's "hot news"). See also *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001) (rejecting argument that the *New York Times* could include freelance articles in electronic databases without authors' permission); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) ("[A] public figure plaintiff must prove more than an extreme departure from professional standards"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (ruling that "right of reply" statute was unconstitutional under the First Amendment).

cerpt and refused to pay the fee it had agreed to deliver to Harper & Row.³⁶⁵

In rejecting *The Nation's* fair use defense on these facts, the Court relied heavily on the circumstance that President Ford's manuscript was unpublished, though protected by statutory copyright.³⁶⁶ Though this statutory change meant that publication no longer signified an election of statutory copyright,³⁶⁷ in *Harper & Row* it remained an important sign of the author's intent to reveal the work to the public.³⁶⁸ That intent, in turn, had significant consequences for fair use. As to the purpose and character of the use, the Court considered several arguments, one of which favored *The Nation* (its article technically constituted news reporting, a favored use), the balance of which favored Harper & Row. *The Nation* purposely supplanted Harper & Row's right to control publication, did so for commercial purposes, and knowingly relied on an unauthorized copy of the Ford manuscript.³⁶⁹ *The Nation* copied portions of a "creative" work that was not yet published.³⁷⁰ It had purposefully selected portions that were "among the most powerful passages"³⁷¹ from book chapters that addressed the Nixon pardon, and that those selections served as the "dramatic focal point[]"³⁷² of *The Nation's* article.³⁷³ *Time's* refusal to pay the balance of the amount due under its original agreement with Harper & Row confirmed the existence of actual harm.³⁷⁴ The nature of the practice in which *The Nation* engaged (competing for first serialization rights for yet-to-be-published book manuscripts, without bidding fairly for those rights) threatened to disrupt this established market as a whole.³⁷⁵

365. See *Harper & Row*, 471 U.S. at 543.

366. See *supra* notes 190-91 and accompanying text.

367. See *Harper & Row*, 471 U.S. at 552.

368. See *id.* at 552-55.

369. See *id.* at 561-63.

370. See *id.* at 563-64.

371. *Id.* at 565.

372. *Id.* at 566.

373. The district court was even more clearly concerned with the fact that the unique value of the "scoop" to *The Nation* lay in the ability to present what the court characterized as "essentially the heart of the book." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983).

374. See *Harper & Row*, 471 U.S. at 567.

375. See *id.* at 568-69.

As in *Sony*, however, the Court's formal fair use analysis leaves much to be desired. Clearly, *The Nation* did something which the Court did not approve. But the Ford autobiography was hardly a work of real literature; it was anticipated by the public (and thus valuable to *Time*) not because of Ford's rhetorical skill, but because he might disclose new information about the Nixon pardon. Given the unprecedented character of the Watergate scandal, it could not be argued reasonably that the public interest was disserved by the earliest possible disclosure of information about Ford's role in the end of the Nixon administration.

As to Harper & Row's injury, the Court's discussions³⁷⁶ of both the "effect on the market" and the effect on the value of the copyrighted work have a forced air. It is true that *Time* backed out of its promise to pay Harper & Row for serialization rights, but the amount at issue was minor, and the loss could have been avoided easily by *Time* (in advance, by discounting the fee by the possibility of Harper & Row's losing control of the manuscript) or by Harper & Row (by taking better precautions to secure the manuscript, or acceding to a request by *Time* that it advance the date of its serialization, even before *The Nation's* activities came to light).³⁷⁷ More important to the Court, *The Nation* tried "to profit from exploitation of the copyrighted material without paying the customary price."³⁷⁸ This reference to the "customary" price might be taken as the license fee negotiated between *Time* and Harper & Row, but it might equally—and more plausibly—concern the bookstore price of the book. If *The Nation* had bought a copy of the manuscript and published the story that it did, it is difficult to imagine Harper & Row succeeding on its infringement claim. The market injury at stake may not have been injury to the market for the work, but to the market for the book.

How, then, did *The Nation* err? *The Nation* knowingly relied on a copy of a manuscript that was provided to it under murky circumstances.³⁷⁹ The manuscript, as *The Nation* also knew, was unpublished.³⁸⁰ *The Nation* parsed the manuscript in order to locate the

376. See *id.* at 566-70.

377. See PATRY, *supra* note 97, at 123 n.96 (describing negotiations between Harper & Row and *Time*, which wanted to advance the publication date).

378. See *Harper & Row*, 471 U.S. at 562.

379. See *id.* at 543.

380. See *id.*

“heart” of its literary and commercial appeal.³⁸¹ It closely paraphrased a selection of statements from that “heart” and published that selection in the magazine.³⁸² Finally, *The Nation*’s publishing of the paraphrases was calculated to conceal the fact that *The Nation*’s reportage originated with Victor Navasky (editor of *The Nation* and author of the Ford article at issue) rather than with President Ford.³⁸³

The Court seems to have been concerned partly at an ethical level—ruling in favor of *The Nation* would amount to “judicially enforced ‘sharing,’”³⁸⁴ suggesting that such an outcome would have been improper in and of itself, regardless of the economic injury alleged by the plaintiff—and partly at an economic level.³⁸⁵ But the ethical dimension suggests that *Time*’s “market” injury alone might not have been enough to tip the scales in its favor.³⁸⁶

The “published vs. unpublished” framework played a key role, then, in connecting these two arguments—but not purely in the sense that the Court acknowledged it formally.³⁸⁷ Instead, that framework appears to have been based on the Court’s (1) implicit acceptance of the relevance of established practices in the book-publishing industry and (2) explicit rejection of the possibility that *The Nation*’s conduct was consistent with journalistic practice. To avoid the obvious conclusion that *The Nation* was acting journalistically in reporting such “news” as was contained in the book, the Court characterized the relevant “news” as the publication of the book (since the “new information” reported by *The Nation* was in

381. *See id.* at 543-44.

382. *See id.* at 564-66.

383. *See id.* at 565.

384. *See id.* at 553.

385. *See, e.g., Lunney, Reexamining, supra* note 163, at 558-60 (describing *Harper & Row* as a debate over application of copyright’s incentive-access paradigm).

386. By definition, and given the Court’s formulation of the issues, the ethical breach did not consist of the market injury itself.

387. Courts following *Harper & Row* picked up on the Court’s distinction between unpublished and published works, and in some noteworthy cases courts found that fair use was no bar to a finding of infringement where the defendant had reproduced unpublished letters of the author (in these cases, typically the subject of a biography who was not flattered by the defendant’s literary efforts). *See New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 583-84 (2d Cir. 1989); *Salinger v. Random House, Inc.*, 811 F.2d 90, 95-100 (2d Cir. 1987). *But see Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 202-03 (4th Cir. 1998) (permitting substantial copying of unpublished manuscript of biography subject without copyright owner’s permission).

fact already in the public record),³⁸⁸ a shift that allowed the Court to reframe the issue as a competition between the authorized publisher and the unauthorized magazine in deciding when and how this “event” should take place.³⁸⁹ The contents of the book may have been subject to claims by competing journalists, but the book itself was off limits, just as any new novel could not be published preemptively by an unauthorized printer.

To the Court, President Ford was an “author” in a publishing world sense. Given the conventions of that world, “authors” get compensated by receiving royalties from a variety of sources, and serialization rights are a typical and an important source of those royalties.³⁹⁰ The Court treated the dispute, in other words, as it would have treated a case involving publication and serialization rights to a new book by a well-known novelist.³⁹¹

The Nation argued that its reportage consisted almost entirely of revelation of additional facts surrounding President Ford’s pardon

388. See PATRY, *supra* note 97, at 136.

389. See *Harper & Row*, 471 U.S. at 561. On the merits, this recharacterization tests the limits of the distinction between the copyright-protected work of authorship, that is, the author’s expression, and the tangible medium in which the work was embodied. See 17 U.S.C. § 202 (2000).

390. This aspect of the Court’s ruling is made clear by the principal arguments of the three dissenting Justices in an opinion by Justice Brennan. The dissent first disputed the characterization of *The Nation*’s conduct as an appropriation of protected literary expression. See *Harper & Row*, 471 U.S. at 583-87 (Brennan, J., dissenting). It then argued that the majority had misapplied the fair use doctrine, on the grounds that (1) the relevant “purpose of the use” was news reporting, *see id.* at 590-94 (Brennan, J., dissenting); (2) the proper characterization of the work was “factual” or “historical” rather than “unpublished,” *see id.* at 594-98 (Brennan, J., dissenting); (3) the amount of copying of President Ford’s literary expression was quantitatively appropriate in light of its news reporting purpose, *see id.* at 598-601 (Brennan, J., dissenting); and (4) any market injury suffered by *Harper & Row* was precisely the sort of market injury suffered by any provider of news that is beaten to the marketplace by a competitor, *see id.* at 602-03 (Brennan, J., dissenting). In short, the dissent looked at the case as a matter of accepted journalistic practice. For a recent case distinguishing the majority’s reasoning in *Harper & Row* on this ground, see *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22-23 (1st Cir. 2000).

391. This summary of *Harper & Row* deliberately omits two important aspects of the opinion, neither of which bears directly on the issues addressed in this Article. First, *The Nation* argued, in part, that its actions were privileged under the First Amendment. The Court held that the First Amendment offered no defense to copyright infringement that was not otherwise available under fair use or copyright’s distinction between unprotectable and protectable material. See *Harper & Row*, 471 U.S. at 556-60. Second, *The Nation* argued that its use of material from President Ford’s memoirs was privileged on the ground that President Ford was a “public figure,” and that news coverage of a public figure was entitled to special treatment under copyright law. The Court rejected this argument. *See id.*

of President Nixon, and that the newsworthiness of these facts should weigh heavily in a fair use analysis.³⁹² The district court rejected the argument, largely on the ground that the facts were already in the public record.³⁹³ The Supreme Court noted that it was not concluding that a fair use defense should stand or fall based on the newsworthiness of the defendant's article.³⁹⁴ Though the Court argued that it was not judging newsworthiness, it nonetheless implied that *The Nation* had weighed the two, sometimes competing, demands of journalism (get it right, but get it first) improperly.³⁹⁵ The claim of "journalism" was dismissed as an "alleged practice"³⁹⁶ that was completely discounted by the fact that *The Nation* had "knowingly exploited a purloined manuscript."³⁹⁷

3. Campbell v. Acuff-Rose Music, Inc.

*Campbell v. Acuff-Rose Music, Inc.*³⁹⁸ is sometimes thought to have restored order to the Court's fair use thinking,³⁹⁹ because the Court decided a fair use case unanimously, because the Court decided the case in a way that clearly favored a claim of fair use, and because the Court gave its stamp of approval to claims to legitimate parody and "transformation." A closer look at the case, however, suggests that it was decided along much the same narrative lines that framed the Court's opinions in *Harper & Row* and *Sony*: a declaration of the pattern of use into which the defendant fell, rather than a principled analysis of the defendant's work and a comparison with the plaintiff's work.

392. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1070-71 (S.D.N.Y. 1983).

393. See *id.*

394. See *Harper & Row*, 471 U.S. at 561.

395. See *id.* at 564 ("While the copyright holders' contract with Time required Time to submit its proposed article seven days before publication, The Nation's clandestine publication afforded no such opportunity for creative or quality control.").

396. *Id.* at 562.

397. *Id.* at 563. See Weinreb, *supra* note 152, at 1308 (1999) ("As the Court perceived the facts, the editor of *The Nation* was a chiseler, a category only a little removed from crook or, in the nineteenth century idiom, pirate—not so much because of the use itself but because of the manner in which he obtained the manuscript.").

398. 510 U.S. 569 (1994).

399. Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1464-66 (1997).

The Supreme Court's decision in favor of the "parody" rap version of "Oh, Pretty Woman" typically is characterized as reversing the *Sony* and *Harper & Row* presumption disfavoring "commercial" fair use, installing a presumption favoring "transformative" fair use, and otherwise mandating that all four factors be weighed together. The first factor weighed in favor of fair use because the 2 Live Crew version of "Oh, Pretty Woman" was credibly perceived as a parody, a form of "transformative" use that offset the otherwise influential commercial character of the song. The second factor weighed in favor of the plaintiff because the original song was creative. The third factor weighed slightly in favor of the defense. The parody version borrowed more than a small amount, yet not the entirety of the original—enough to conjure it up in the minds of listeners but not so much as to displace it entirely. The Court left the fourth factor for reconsideration on remand, indicating that the plaintiff would have one more chance to introduce evidence of market injury.⁴⁰⁰

A closer reading of *Campbell* suggests that its restatement and application of the statutory factors is no more credible than the Court's earlier application of the statute in *Sony* and *Harper & Row*. The entirety of the analysis hinges on the Court's conclusion that 2 Live Crew's work was perceived reasonably as a parody. That caused the first factor to flip in the defendant's favor and, as in *Sony*, caused the second and third factors to become far less important. The Court's treatment of the fourth factor, harm to the plaintiff's market, is inconsistent: if the defendant's song really was a parody, as the Court concluded, then its critical character rendered its market impact by definition nonsubstitutional. The Court then should have remanded the case with instructions to reinstate the judgment in the defendants' favor. Instead, it remanded the case with instructions to consider possible substitutional harm.⁴⁰¹

400. See *supra* notes 207-08 and accompanying text.

401. The Court's rationale on this point was that the song was both "parodic" and "rap" in character, so the latter might have had recognized market effects. In this respect, the Court punted by trying to distinguish parody (possibly fair use) from satire (not fair use), see *supra* notes 259-61 and accompanying text, and it punted backwards. 2 Live Crew's "parodic" version of "Oh, Pretty Woman" is part of the social and critical context of rap music, which includes a musical movement during the 1980s by black artists to reclaim rock 'n' roll and R&B as dance music for black audiences following white audiences' rejection of disco. This evolution is chronicled in Sean Ross's liner notes to *STREET JAMS: ELECTRIC FUNK* (PARTS 1-4)

What the Court appears to have been up to, then, is the same sort of characterization exercise that dominated both *Sony* and *Harper & Row*. The Court characterized the defendant's output as "parodic"⁴⁰² and possibly "transformative,"⁴⁰³ but what the Court really appears to have concluded was that the defendant was engaged in an activity that fairly could be characterized as "creating a parody":

For the purposes of copyright law, the nub of the definitions [of parody], and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work.⁴⁰⁴

Satire, by contrast, "merely uses [the plaintiff's work] to get attention or to avoid the drudgery in working up something fresh."⁴⁰⁵ Concluding, then, that a "parodic character" could "reasonably be perceived" in the defendant's work, the Court was formally engaged in the classic fair use exercise of comparing one work to another. In substance, however, the Court was evaluating the process by which 2 Live Crew had come to that result:

In parody, as in news reporting, ... context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed

(Rhino Records 1994). (My thanks to Henry Hufnagle for this suggestion and reference.) See also SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 132-40 (2001) (discussing the criticism of rap music as being a comment on white musical appropriation of black artists). In this sense, 2 Live Crew was participating in an established pattern of recasting white rock and pop music for black dance audiences. In the context of the Court's framework in *Campbell*, 2 Live Crew belongs in the "satire" camp (using the Orbison song to make a broader social comment), a fact that weakens their claim to fair use. But the recasting phenomenon arguably makes critics of 2 Live Crew. If 2 Live Crew were to make a critical version of "Oh, Pretty Woman," the result would sound (both literally and metaphorically) in rap. Their "parody" of *Oh, Pretty Woman* likewise sounds in rap. The question then ought to have been whether 2 Live Crew were in fact reasonably understood to be acting critically, not whether their record was predominantly "parodic" or "rap." I generalize this point *infra* at Part III.C.4.c.

402. *Campbell*, 510 U.S. at 583.

403. *Id.* at 589.

404. *Id.* at 580.

405. *Id.*

markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, and altering the drum beat.⁴⁰⁶

Note how the Court characterized the issue in terms of what 2 Live Crew did, rather than in terms of 2 Live Crew's work. In effect, 2 Live Crew was engaged in the practice of parody. So long as they did so, the character of the work parodied was irrelevant (second factor), the amount borrowed was legitimate (third factor) since a true parody would take only so much as to make its object recognizable, and no more, and the market effect (fourth factor), if any, was irrelevant.

4. Fair Use and Patterns in the Circuits

That fair use jurisprudence can be reorganized around social and cultural patterns is evident not merely by recasting the Supreme Court's three opinions and Justice Story's seminal opinion in *Folsom*. The leading appellate opinions reviewed above likewise are susceptible to being reshaped along the same lines.

a. The Photocopying Cases

In *Williams & Wilkins Co. v. United States*,⁴⁰⁷ decided before codification of fair use, the majority concluded that the defendant's photocopying practices amounted to fair use on the premise that the photocopying in question amounted to the functional equivalent of the standard scholarly or research practice of note taking.⁴⁰⁸ The defendant, the court concluded, was engaged in a research enterprise (in this, it no doubt helped their case that their research was undertaken within, and was not merely sponsored by, a federal agency) and a successful copyright claim likely would damage the character of that enterprise.⁴⁰⁹

406. *Id.* at 589 (footnotes omitted).

407. 487 F.2d 1345 (Ct. Cl. 1973).

408. *See id.* at 1350.

409. *Id.* at 1362.

In *American Geophysical Union v. Texaco, Inc.*⁴¹⁰ and *Princeton University Press v. Michigan Document Services*,⁴¹¹ the Second and Sixth Circuits each reached the opposite conclusion. The individual beneficiaries of unauthorized photocopying in *American Geophysical Union* were characterized nominally by the court as “researchers,” but the photocopying was regarded as a “factor of production” for the corporate defendant.⁴¹² The corporate defendant was not considered to be a “research” or scholarly enterprise, and the individual researchers, whose use of the copyrighted material was questioned, were not using this material as researchers or scholars, in some “classic” sense, would use it.⁴¹³ Requiring an author’s or publisher’s permission for reproduction would cause little or no damage to the corporate hierarchy.⁴¹⁴

Princeton University Press can be understood on the same terms. The photocopying defendants were neither university faculty nor their students, either of whom would have had a credible claim to stand on the same footing as the researchers in *Williams & Wilkins*. The defendant was a photocopying services company, which had no “standing” (pragmatically speaking) to assert researcher or scholar interests by proxy or agency. In effect, the court examined the academic/scholarly/research enterprise and determined that photocopying services stood outside that enterprise. The photocopying was not itself part of a recognized pattern of research, teaching, or scholar-

410. 60 F.3d 913 (2d Cir. 1994).

411. 99 F.3d 1381 (6th Cir. 1996).

412. *Am. Geophysical Union*, 60 F.3d at 921-22.

413. The dissent in *American Geophysical Union* captured and responded to precisely this argument, noting that the anthropologist Bruno Latour, studying scientific research practices, had observed individual scientists collecting and managing research data in precisely the way that the individual scientists had done for their employer, Texaco. *See id.* at 934-35 (Jacobs, J., dissenting). The dissent, however, used Latour’s research to argue that the act of photocopying was integral to the scientific method, *see id.* (Jacobs, J., dissenting) (citing BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* 49 (1986)), when it may be the case that Latour was more concerned with the documents themselves, and how they are used by individuals to construct social networks, than with the manner in which they were created. *See id.* at 52-53; *cf.* John Seely Brown & Paul Duguid, *The Social Life of Documents*, 1 *FIRST MONDAY*, No. 1 (May 6, 1996) (expanding on the notion of documents as social instruments), at <http://www.firstmonday.dk/issues/issue1/index.html>.

414. *But see* Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 *YALE L.J.* 369, 406-23 (2002) (describing peer-to-peer computer networks as mechanisms for coordinating production that do not depend on traditional hierarchical firm).

ship by the individual or entity doing the copying.⁴¹⁵ The court's conclusion may be challenged as inhibiting some notion of scholarly or research "Progress," since the parts of a university are interdependent. No scholar or student succeeds without the assistance of an extensive (and growing) administrative infrastructure, and the scope and scale of the academic community evolves over time. Nonetheless, the court quite clearly rejected such an expansive view of the research and teaching process, and its fair use determination seems clearly motivated by that rejection, rather than by the judgment that markets for permission and licensing of photocopies were well-developed by the time these cases were decided.⁴¹⁶

b. The News Reporting Cases

Earlier, I noted that the three cases involving reuse of broadcast footage of the 1992 Los Angeles riots could be distinguished from one another based on the Ninth Circuit's reworking of the commercial/noncommercial distinction and its handling of the market impact of the unauthorized reuse.⁴¹⁷ I also suggested that these distinctions have an unreal aspect, in that they largely ignore the journalistic context of both the original collection of the tape by the plaintiff and the claims to journalistic reuse that were offered by the first two defendants (held liable for infringement)⁴¹⁸ but not by the third (which prevailed).⁴¹⁹

A more persuasive synthesis of the cases merges market/commercial perspectives with the journalism context. Restated, then, the defendants' claims of fair use failed in *Los Angeles News Service v. KCAL-TV Channel 9* and in *Los Angeles News Service v. Reuters International* because the news organizations accused of infringement, while journalistic in overall demeanor, were not acting as journalists when they obtained and used the plaintiff's copyrighted work. Journalists investigate and research, they interview subjects and sources, and they assemble something we call, broadly, "news."

415. *Princeton Univ. Press*, 99 F.3d at 1389.

416. *See supra* Part II.C.5.a.

417. *See supra* Part II.C.5.c.

418. *See L.A. News Serv. v. Reuters Int'l*, 149 F.3d 987, 994 (9th Cir. 1998); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121-23 (9th Cir. 1997).

419. *See L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938-40 (9th Cir. 2002).

This argument echoes that of the *Harper & Row* majority.⁴²⁰ Journalists do not simply borrow or copy the work of others. The defendants in the first two cases, KCAL and Reuters, are organizations or institutions of journalists, but in these cases they were not practicing journalism.

What then of CBS Broadcasting, which copied a much smaller piece of this same videotape (a total of approximately thirty seconds) and used it in promotions for *CourtTV*?⁴²¹ One could argue that CBS is, at least in part, a journalistic enterprise and the *CourtTV* coverage of the trial of some of those accused in the beating was a recognized form of "news." Using a small clip from the videotape as part of promoting that coverage, when the tape itself was certain to be introduced and played as evidence in the trial, could be characterized justly as practicing journalism, even while it also served a promotional purpose. It might be regarded as little different than a newspaper's use of a large photograph both to illustrate a front-page story and to attract prospective newsstand purchasers.

The argument cannot prove too much. At best, *CourtTV* lies at the fringes of traditional "journalism." Perhaps *CourtTV* could be regarded as an extension of the trial itself, and the use of the videotape regarded as a mass extension of the privileged use of copyrighted works as evidence in a court proceeding. Or perhaps, if no relevant and persuasive pattern could be found to support the use, then the Ninth Circuit erred, at least on the fair use question. Certainly, its conclusion regarding the lack of market effect of the unauthorized use of the videotape is not persuasive. *CourtTV*'s use of the segment was deliberate, and there was ample time to secure a license. As an entertainment entity, *CourtTV* was well-positioned to work with the extensive system of rights clearances that characterize most broadcast television. Its failure to observe industry customs regarding clearances might have indicated that infringement was the better finding.⁴²² That infringement was not found might indicate not that the use was "fair," but that the use was so trivial that it did not constitute a *prima facie* case of infringement in the first

420. It also echoes the theme that the law will step in, occasionally, to manage the norms and practices of journalists. See *supra* note 364.

421. See *CBS Broad.*, 305 F.3d at 940.

422. Cf. *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (dismissing possibility that motion picture based on copyrighted short story might constitute fair use).

place. Los Angeles News Service may simply have overreached in its argument that each second of its videotape was, in effect, a separately copyrighted work.

c. The Parody/Satire Cases

The contrasting results in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*⁴²³ and *SunTrust Bank v. Houghton Mifflin Co.*⁴²⁴ sometimes are used to illustrate both conceptual and functional inconsistencies in parody and satire cases. The line between the two, if one really exists, is sufficiently porous that one could, and likely should, argue that any credible claim of parody, including satire, ought to be accepted as a form of social criticism.⁴²⁵ Perhaps, then, the Ninth Circuit should have accepted the parody defense offered by the authors of *The Cat Not in the Hat*.⁴²⁶ Reading the two opinions, one might wonder not why the Ninth Circuit failed to give the authors of *The Cat Not in the Hat* sufficient copyright leeway to make their point, but instead why the Eleventh Circuit was so generous to the author of *The Wind Done Gone*. In both cases the defendants argued that their work was consistent with literary theorists' constructions of parody, that is, work that comments (wholly or partly) on the work that now complains of alleged infringement. It is at least equally plausible that Dr. Seuss and Margaret Mitchell were unwilling accomplices in broader missions of social criticism.⁴²⁷ The claim of Seussian parody was thus properly rejected and the claim of Mitchellian parody improperly accepted.

The difference between the two cases may not lie in the character of the defendants' respective end-products. The problem lies in the lack of self-awareness on the part of the *Seuss* defendants and the comparative standing of the author of *The Wind Done Gone*. The court dismissed the *Seuss* defendants' claim of parody, accusing the defendants of making up their literary theory after the fact in order

423. 109 F.3d 1394 (9th Cir. 1997).

424. 268 F.3d 1257 (11th Cir. 2000).

425. See Ochoa, *supra* note 166, at 559-64.

426. See *supra* notes 262-68 and accompanying text.

427. The attack on *Gone With the Wind* was equally an attack on the cultural tradition that the book represents. But the author of *The Wind Done Gone* submitted expert testimony supporting her claim of parody. See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1737 & nn. 8-9 (N.D. Ga.), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).

to suit the needs of their legal argument.⁴²⁸ Alice Randall, the author of *The Wind Done Gone*, by contrast, presented colorable evidence that she understood and accepted the critic's role *while she was writing* the book.⁴²⁹ In the infringement suit, she argued that she was practicing parody, or at least literary criticism, under the broad definition of parody adopted by the Eleventh Circuit. Whether she understood she was practicing parody at the time she was writing, she did understand that she was practicing criticism, and her product was consistent with that understanding.

d. The Time-Shifting and Space-Shifting Cases

Given this focus on pattern and practice, rather than merely on the works themselves, it is hardly surprising that the Ninth Circuit should distinguish *A & M Records, Inc. v. Napster, Inc.*⁴³⁰ from *Sony Corp. of America v. Universal City Studios, Inc.*⁴³¹ If Sony was a company engaged in the merchant's practice of selling products to anonymous consumers and then effectively walking away from them, then Napster was doing something more. Even after distribution of Napster's technology, millions of anonymous "users" jointly engaged, with the defendant, in massive anonymous transmission of "copies" of the plaintiffs' works to one another. Napster did not distribute technology to "users" who then used the software independently. Rather, Napster remained deeply embedded in the "users'" activities. From the standpoint of conventional patterns and practices, Napster was distributing the plaintiffs' works as much as the individual end-users were distributing them.

This explanation accounts for the odd combination in the *Napster* opinion of unequivocal condemnation of the behavior of both MusicShare users and of Napster (the actual defendant), as well as the uncertain analysis of precisely what each, separately, had done wrong. Doctrinally, Napster was accused only of contributory and vicarious copyright infringement. The individual end-users were accused in absentia of direct infringement. But the court blended its rhetorical and argumentative energy, leading to a failure to distin-

428. See *Dr. Seuss Enters.*, 109 F.3d at 1402-03.

429. See *SunTrust Bank*, 268 F.3d at 1269-71.

430. 239 F.3d 1004 (9th Cir. 2001).

431. 464 U.S. 417 (1984).

guish among Napster, the company, Napster, as the court sometimes referred to the music sharing software and system, each individual user, and the collective of all users (including the company). The conventional understanding of "file sharing" and of the product name "MusicShare" is that individual music listeners are "sharing" the music with one another. But it is clear that the court instead addressed the proposition that in effect, Napster, the firm, was engaged in improper "sharing," along with Napster users taken as a whole.⁴³² In the court's words, the fourth fair use factor favored the plaintiffs, and a finding of infringement, because

the record supports the district court's finding that the "record company plaintiffs have already expended considerable funds and effort to commence Internet sales and licensing for digital downloads." Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads.⁴³³

The court thus framed the issue as the effect of all MusicShare users taken together and their equivalence with the Napster system.⁴³⁴ It did not deal with the appropriate way to aggregate individual Napster users and the manner in which Napster, the company, interacted with those users.

Further, "the district court made sound findings related to Napster's deleterious effect on the present and future digital download market."⁴³⁵ From a doctrinal perspective, the court's argument amounts to a form of double counting in fair use. The fair use defense formally applies to users themselves. Whether they are "fairly using" the plaintiffs' copyrighted works informs the court as to whether Napster is liable under theories of vicarious or contributory liability. Yet by examining the market effect of Napster itself, the court proceeded as if Napster had asserted a fair use defense to its own potential liability for secondary infringement.⁴³⁶

432. See *Napster*, 239 F.3d at 1019-24 (discussing Napster's liability for contributory copyright infringement).

433. *Id.* at 1017 (quoting *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 915 (N.D. Cal. 2000)) (citation omitted).

434. *Id.* at 1016.

435. *Id.* at 1017.

436. The appellate court's citations also support this interpretation. To support its "no fair

The way to make sense of this somewhat confused argument is not to debate whether individual users were exercising rights to “personal” or “private” use of “their” music, and to accuse or to defend Napster as a contributory infringer based on the vagaries of whether its system design gave the company “knowledge” of user behavior.⁴³⁷ The better route is to situate both Napster and individual users within the context of relevant patterns and practices. Individual users, as music consumers, had access to established and traditional patterns of sharing recorded music and other forms of recorded entertainment. Listening to a compact disc in one’s own home, apartment, dormitory room, or in the company of a few friends, is acceptable “sharing” among individuals, even if only one person among the group actually has bought and paid for the recording.⁴³⁸ If the audience is expanded too broadly, even if all members

use” argument, the court relied on *L.A. Times v. Free Republic*, 54 U.S.P.Q.2d 1453 (C.D. Cal. 2000) and *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), both of which held defendants (operator of a website that hosted unauthorized “copies” of newspaper articles, in *L.A. Times*, 54 U.S.P.Q.2d at 1469-71; the proprietor of a website that hosted unauthorized “copies” of music files for download via the Internet, in *UMG Recordings*, 92 F. Supp. 2d at 350, 352) directly liable for copyright infringement. See *Napster*, 239 F.3d at 1017. In both cases, the defendants raised (and the courts rejected) fair use arguments directed to their own conduct—rather than that of users who accessed and downloaded material from their respective sites. See *L.A. Times*, 54 U.S.P.Q.2d at 1459-72; *UMG Recordings, Inc.*, 92 F. Supp. 2d at 350-53. In a similar vein is the *Napster* court’s argument, again under the first fair use factor, that Napster use is likely not to be “fair” if it is “commercial.” It is “commercial” because, in the aggregate, Napster users get free songs that otherwise would be purchased. See *Napster*, 239 F.3d at 1015. The court equated “economic advantages” for Napster users with “commercial use” of the plaintiff’s works in a bit of doctrinal sleight of hand that attributed Napster’s commercial activity to individual Napster users. *Id.* The court supported its conclusions with a citation to *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994), which held the operator of a computer bulletin board liable for direct and contributory copyright infringement where copies of the plaintiff’s computer games were made available to bulletin board users to download for free. *Napster*, 239 F.3d at 1015. In *Sega*, however, the court explicitly found the defendant liable for direct copyright infringement (by contrast, Napster was accused only of contributory and vicarious infringement), and its conclusion regarding “commercial use” of computer users in response to the defendant’s fair use argument clearly was influenced by its sense that the defendant itself (the bulletin board operator) was reaping clear “economic advantage.” *Sega Enterprises Ltd.*, 857 F. Supp. at 683-84 (describing defendant’s profits from operating the bulletin board).

437. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035-39 (C.D. Cal. 2003) (holding file sharing service not liable for users’ copyright infringement and distinguishing *Napster* on the ground of different technical design).

438. It is probably legally acceptable even if none of the audience members has purchased a copy of the recording. One might locate additional support here in a sort of communal

of that audience are physically present, at some point the work has been shared too broadly. It is no longer an accepted pattern of sharing—it becomes a concert. With respect to “copies” of the works rather than the music itself, a given user becomes not only a consumer of each recording, but also a distributor of multiple copies. Redistribution of a single copy conforms to a pattern recognized socially and legally under the “first sale” doctrine.⁴³⁹ The Napster system permitted music consumers to step outside a pattern regarding material that could be shared among themselves.⁴⁴⁰

IV. A PATTERN-ORIENTED RECONSTRUCTION OF FAIR USE

Having described how the doctrine of fair use might be understood more profitably as addressing the intersection of copyright law and social and cultural patterns, in this Part I attempt to formalize the approach. In the first section that follows, I review what social and cultural patterns are and describe how an emphasis on those phenomena can be reconciled with the language of the current fair use statute. The second section below compares the generalized patterns model developed in the first section and applies it more broadly to fair use case law since enactment of the current copyright statute. My goal is to test whether the model developed from the leading cases adequately describes a broader class of cases. In the third section, I describe how implementing a focus on patterns would encourage a positive change in both the dynamics of copyright

implied license. *See, e.g.,* *Am. Inst. of Architects v. Fenichel*, 41 F. Supp. 146, 147 (S.D.N.Y. 1941):

It is true that the form that [the defendant] copied was the largest, and ... the most important, of the forms in the plaintiff's album, but fair use is not determined by quantity alone. When the plaintiff put on the general market a book of forms, he implied the right to their private use. This conclusion follows from the nature of a book of forms. No one reads them as literature; their sole value is in their usability.

Id. But my argument does not rest on the copyright owner's consent or on formal privileges extended by *Sony* or (for audio recording in an analog environment) the Audio Home Recording Act. *See* 17 U.S.C. § 1008 (2000).

439. *See* 17 U.S.C. § 109(a) (2000).

440. The court appeared to link unauthorized sharing among Napster users to an argument that users themselves reap “economic advantages” from Napster use, in the sense that users get something for free that ordinarily they would pay for. *Id.* at 912. But this interpretation is misleading, for not only did the court not argue that music consumers cannot listen to music without paying for it, but such an argument would defy common knowledge.

litigation and the dynamics of copyright counseling, particularly from the standpoint of an institution or even an individual faced with the prospect of complying with a license demand or asserting a claim of fair use.⁴⁴¹ This third section also uses the pattern-oriented approach to address some of the most vexing conceptual problems embedded in contemporary fair use discourse.

A. Patterns and the Sources and Uses of Creativity

1. The Pattern-Oriented Approach

Part III attempted to redescribe the leading cases interpreting the fair use doctrine, in both historical and contemporary terms, as decisions about whether the defendants' uses of copyrighted material fell appropriately within or beyond recognized social or cultural patterns. In some cases, courts' rulings reflect these patterns without recognizing this standard as the basis for decision. The pattern-based argument, however, is implicit and at times even explicit in the opinions themselves. In other cases, courts are so bound to the four-factor standard supplied by the current statute that the pattern-oriented approach can be applied only retrospectively, supplying what may be a more persuasive justification for a result that is nominally but unhelpfully grounded in the statutory text.⁴⁴²

Courts should recognize explicitly, then, what some have been undertaking implicitly. Decisions regarding whether any given unauthorized "use" of a copyrighted work is "fair" under § 107 should be judged by whether that "use" is undertaken in the context of a recognized social or cultural pattern, and the four statutory fair use factors should be interpreted and applied as part of an overall pattern-oriented framework.

The proposal goes beyond arguing merely that fair use ought to have a formally coherent dimension; it argues that social and cultural patterns represent the sorts of things that courts affirmatively ought to look for in assessing the merits of a fair use argument. We know that all too often, fair use serves as little more than a stopping

441. See generally Kenneth D. Crews, *Copyright at a Turning Point: Corporate Responses to the Changing Environment*, 3 J. INTELL. PROP. L. 277 (1996) (describing results of interviews with institutional users of copyrights).

442. See *supra* Part III.

point in infringement analysis. Even when it is argued that fair use serves a balancing function in copyright law, where the interests of "Progress" are better served by allowing the unauthorized use of copyrighted material than by forbidding it, lest the law stifle the very creativity that copyright is designed to promote,⁴⁴³ neither law nor policy supplies an account of what the affirmative case for fair use represents. At present, the law of fair use (as I summarized in Part II) cannot explain how it actually promotes either "creativity" or "Progress." It is said that fair use exists to supply creativity that the market economy fails to induce.⁴⁴⁴ It is also said that fair use consists of balancing (in economic terms, or in broader social welfare terms) the interests of the individual copyright holder against the interests of "society" or "the public."⁴⁴⁵ The individual defendant stands in for "the public," but the individual's claim to "creativity" or "Progress" in his or her output standing alone is a flimsy basis for distinguishing fair and unfair uses. We have no stable notion describing what "creativity" consists of at a social level, or how "creativity" arises either individually or socially.⁴⁴⁶ Consequently we have no coherent understanding of why the "balance" theory should work. Rather than despairing of ever defining "creativity" or "Progress" or even "social value" adequately with reference to the quality of the output itself—a task that federal courts have themselves long disclaimed—I suggest defining it with reference to process or, as I refer to them, patterns. A use is "fair" under § 107 if it falls within the boundaries of a recognized social or cultural pattern.

What, then, are these patterns? The phrase is almost inevitably opaque, given its dependence on the richness of social organization and behavior. Generally speaking, patterns are structures—social structures and cultural structures—that involve relatively stable sets of beliefs and practices grouped around individuals, institutions, and (often) goals. A "pattern" in this sense can be recognized using tools of sociology, psychology, and anthropology, including

443. See *supra* note 88 and accompanying text.

444. See *supra* Part II.B.1 (describing market failure account of fair use).

445. See *supra* Part II.B.2 (describing broader social welfare approaches to fair use).

446. To the extent that "creativity" is deemed to be a proxy for broader social values, such as autonomy, privacy, or an informed citizenry, see *supra* notes 165-70 and accompanying text, the vagueness of those concepts renders fair use even more indeterminate, rather than more affirmative.

linguistics. (I hasten to add that only rarely should lawyers or judges be required or expected to go through the trouble of employing social scientists as experts, though there is no reason based on the doctrine that they should not be permitted to do so.)

Sociologically, the pattern should be recognized by the identification of individual and institutional roles, by the goals that both seek to achieve, and by some rule-based specification of relationships (practices) among pattern participants and among those participants and goals to be achieved. Linguistically, a pattern may have a vocabulary and syntax that defines participants in the pattern and how they are expected to behave.

As a practical matter, and for fair use purposes, not any pattern will do; the decided cases suggest that the pattern should have a pedigree of tradition and history such that the practices embedded in the pattern are characteristically recognized as "creative" or at least as tending to promote some form of "progress" that does not depend on the market economy. These sorts of patterns are likely to have a presumptive legitimacy simply by reason of legal and cultural precedent. Moreover, in most cases, the central distinguishing feature of such a pattern will be a norm, convention, or practice that involves some form of reciprocal or donative interest or obligation.⁴⁴⁷

447. On the appeal of reciprocity as an independent criterion, see MICHAEL POLANYI, *THE STUDY OF MAN* 68 (1959) (observing "growth of knowledge dependent on complex sets of social relations based on largely institutionalized reciprocity of trust among scholars and scientists"); THOMAS C. SCHELLING, *MICROMOTIVES AND MICROBEHAVIOR* 127-28 (1978) (arguing that social institutions based on reciprocation can bridge gaps between individual and collective interests); Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, 13 *SOC. PHIL. & POL'Y*, No. 2, at 145, 163-65 (1996) (noting productive potential of informal groups, with boundaries policed by reciprocity); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 *B.U. L. REV.* 333, 335-40 (2001). In another article, Kahan argues:

When [individuals] perceive that other individuals are voluntarily contributing to public goods, most individuals are moved by honor, generosity, and like dispositions to do the same. When, in contrast, they perceive that others are shirking or otherwise taking advantage of them, individuals are moved by resentment and pride to withhold their own contributions and even to retaliate if possible.

Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 *U. RICH. L. REV.* 367, 368-69 (2002). See generally Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 *AM. SOC. REV.* 161, 174 (1960) ("[T]he norm of reciprocity is a concrete and special mechanism involved in the maintenance of any stable social system.").

But formally, reciprocity need not be an explicit norm, and neither it nor "creativity" is an absolute requirement of a given pattern or of the model as a whole. The key evidentiary concern should be the presence or absence of a pattern as such, not whether the pattern is qualified as "reciprocal" or "creative" or "productive." The balance of this Part is devoted to explaining how such patterns might be identified, and to showing how courts have used them in their decisions. Omission of "reciprocity" and "productivity" as formal criteria is explained further via the argument offered in Part V. (The brief justification is that the existence of the pattern itself supplies boundaries that limit interference with legitimate market-oriented expectations of copyright producers, and the internal dynamics of patterns are themselves likely to generate creative returns.)⁴⁴⁸ Use that is consonant with patterns of this sort should be distinguished from transactions defined by market-based exchange, that is, transactions defined by price, and by buyers and sellers.⁴⁴⁹ This use of "patterns" also should be distinguished from a linguistic use that focuses not on a collection of practices and beliefs, but on some essential definition of the valid "thing." A use may be "fair" if it comes within the boundaries of the pattern; it need not match a social or cultural "ideal."⁴⁵⁰ Established patterns of language use are

448. Could a group of computer "hackers" assert membership in a relevant pattern? Likely not, if the argument is made only in an incredible effort to avoid copyright prosecution. See *United States v. Slater*, 348 F.3d 666 (7th Cir. 2003). But perhaps they can, if the evidence of a genuine and independent social structure is sufficiently strong. See STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (1984) (discussing ethics of early computer users). Extra-copyright norms could be invoked at the extremes to bar claims of fair use by criminal conspiracies of other sorts.

449. To the extent that both "fair use" patterns and patterns of market exchange are "economies" of a sort, the distinction drawn here echoes the distinction that Karl Polanyi drew between an older economy "embedded in social relations" and a newer economy of social relations "embedded in the economic system." KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 57 (1944). "Fair use" consists of use consistent with the older sort of economy. For more on how the model deals with market concerns, see *infra* notes 617-25 and accompanying text.

450. For summaries by legal scholars of the case against essentialism in language, see, for example, James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383, 408-19 (1987); Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 652-53 (1990). A given pattern necessarily embraces a range of practices rather than a single paradigm:

The organization of the linguistic category *hand* can be understood as a *radial* category. It has a central case and certain conventionalized extensions. Each extension is related to the central case by means of an experientially-grounded

likely to reflect substantive patterns of social organization,⁴⁵¹ so linguistic evidence will often be relevant. "Pattern" as used here is part of a family of related concepts, including practices, customs, norms, and conventions,⁴⁵² and evidence of each should also be relevant to fair use analysis under the framework that I propose.⁴⁵³

In both social and linguistic respects, the pattern-oriented approach echoes the notion of "fields" of practice proposed by the French sociologist Pierre Bourdieu. Though in a very different and specific context, Bourdieu offered the idea of the *habitus* to define the formal and informal processes—the knowledge base, the internalized codes of thought and action, and manners of thought, or in sum, the feel for how things are done, or the activities and concepts that both unify and produce practices and representations—that constrain action within a given domain.⁴⁵⁴ (Bourdieu himself re-

metaphor or metonymy, although the various extensions may have little in common with each other besides their connection to the central case. The radial structure of the category is itself conceptualized metaphorically using the *center-periphery* schema. The use of this schema to organize and categorize our experiences has a powerful experiential grounding in our necessarily egocentric perception of the world around us.

Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1150 (1989) [hereinafter Winter, *Transcendental Nonsense*]. Our linguistic frameworks and our social frameworks mirror one another. Cf. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 36 (1980) (characterizing metaphor as "a way of conceiving one thing in terms of another," and metonymy as a way of "us[ing] one entity to stand for another"); GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* 100-06 (1989) (distinguishing literary use of metaphor from metonymy, but classifying both as forms of conceptual schemas).

451. Implicit here and explicit below is the expectation that patterns count only to the extent that they define (or are defined by) practices at some level of *social* organization. *Cultural* patterns fall within this measure in the sense that they depend on and are generated by distributed social groups that share norms or conventions. Individual consumption and use is only "fair," ordinarily, to the extent that it feeds some broader, defined pattern that encompasses others.

452. See H.L.A. Hart, *THE CONCEPT OF LAW* 15 (2d ed. 1994).

453. See Solove, *supra* note 18, for a related arguments regarding "families" of cultural and social phenomena that underlie legal concepts.

454. See generally PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* (1987); PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* (Richard Nice trans., 1990) [hereinafter BOURDIEU, *LOGIC OF PRACTICE*]. Bourdieu's larger project is to expose how social classifications of things, and particularly art and culture, are related to social classifications of individuals and groups, and then to suggest the transformation of the modern economy based on these classifications. The concept of "field" and of *habitus* feeds that classification system; patterns of cultural production are essentially fixed based on an alleged "objective" socioeconomic structure. The idea of "mental habits" influencing social and cultural patterns

ferred to the *habitus* concept primarily in the context of membership in social class, but the concept need not be so limited.)⁴⁵⁵ A given "field," then, is the domain in which an individual, via his *habitus*, constructs and reconstructs his social position. The field consists of the social arena, the construct or network of "objective" social relationship structures that operate more or less autonomously within society as a whole, with its own set of codes and rules. Fields may be narrow (high fashion, commercial real estate), or broad (economics, literature, politics). In Bourdieu's broad sociology these fields are subject to redefinition by the process of social contests (in which *habitus* plays a key role) for the social capital that is the object of any given field.⁴⁵⁶ Field constructs *habitus*, and *habitus* constructs field.

I do not suggest that the pattern-oriented approach to fair use is or should be wedded to Bourdieu or specifically to the concept of the field. Equally helpful analytic resources here are the broad concepts of the institution, which encompasses individuals, groups, relationships, and cognitive schemes and frames for constructing them;⁴⁵⁷ the community of practice, groups of individuals united informally by shared normative expectations, habits, customs, and group identity;⁴⁵⁸ and "practice" itself, defined as a shared but informal set of

can be traced to Erwin Panofsky's thesis that elements of Gothic design derive from comparable elements in Scholastic philosophy. See ERWIN PANOFSKY, *GOthic ARCHITECTURE AND SCHOLASTICISM* 21 (1951) (defining mental habit as "a 'principle that regulates the act'") (citation omitted).

455. I do not mean to import the full depth and durability of the *habitus* concept, nor of Bourdieu's sociological theory as a whole. As my inclusion of other work on social and cultural patterns suggests, my analysis is intended to be more evolutionary than merely reproductive.

456. See BOURDIEU, *LOGIC OF PRACTICE*, *supra* note 454, at 108-10.

457. See Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263, 263 (1997) (reviewing "cognitive presuppositions behind theories of what culture does and what people do with it"); Roger Friedland & Robert Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232-63 (Walter W. Powell & Paul DiMaggio eds., 1991); Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra*, at 143-63. Lynne G. Zucker, *The Role of Institutionalization in Cultural Persistence*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra*, at 83-107.

458. See JEAN LAVE & ETIENNE WENGER, *SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION* 98 (Roy Pea & John S. Brown eds., 1991) (defining "community of practice [a]s a set of relations among persons, activity, and world, over time and in relation with other tangential and overlapping communities of practice [I]t provides the interpretive support necessary for making sense of its heritage"). See also Thomas C. Grey, *What Good Is Legal Pragmatism?*, in PRAGMATISM IN LAW AND SOCIETY 9, 12 (1991) ("[T]hought always comes

practical understandings, with a normative component, embedded in social structures.⁴⁵⁹ The underlying point is that the existence and content of a given pattern cannot be determined entirely or even primarily within the analytic framework supplied by the fair use doctrine itself. Though we necessarily begin with the law, inevitably the law must look outside itself.

Accordingly, use of a copyrighted work in a way that is consistent with such a pattern, that is, in process terms, a use that is substantiated by the role played by the work and by individuals and institutions in that pattern, ordinarily ought to be considered "fair." The list of favored purposes in the preamble of § 107 is, among other things, a nonexclusive list of such patterns: "criticism, comment, news reporting, teaching ... scholarship, or research."⁴⁶⁰ Inevitably, there will be contests over the "correct" pattern to use as a measure of a given defendant's use and contests over whether a given use properly resides within or without that pattern. I cannot suppose that this approach is outcome-determinative in every case. I do suggest, however, that it is a more sensible and ultimately more coherent approach from which the fair use question should be interrogated.⁴⁶¹

For example, where currently courts (and litigants) investigate claims of fair use by querying whether the work produced by a given defendant is "commercial" or "noncommercial," "transformative" or

embodied in practices—culturally embedded habits and patterns of expectations, behavior, and response."); David McGowan, *From Social Function to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515, 1524-33 (2003) (arguing that First Amendment jurisprudence requires sensitivity to social practices).

459. See DAVID STERN, *THE PRACTICAL TURN*, BLACKWELL GUIDEBOOK TO THE PHILOSOPHY OF SOCIAL SCIENCES (Stephen P. Turner & Paul A. Roth eds., 2003) (characterizing practice theory as paying close attention to particular practices and the context in which they are located); Theodore R. Schatzki, *Introduction: Practice Theory*, in *THE PRACTICE TURN IN CONTEMPORARY THEORY* 2-4 (Theodore R. Schatzki et al. eds., 2001).

460. 17 U.S.C. § 107 (2000).

461. It is part, therefore, of a broader theoretical approach that situates the foundations of stable law in large part in social conventions rather than solely in legal institutions. See, e.g., Lon L. Fuller, *Human Interaction and the Law*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 211-46 (Kenneth I. Winston ed., 1981); see also Gerlad J. Postema, *Conventions in Law*, in 1 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 466-67 (Peter Newman ed., 1998) (describing social conventions as regularized manifestations of social patterns defined by mutual expectations and interest in solving coordination problems and serving as part of the foundation of law). See generally Lon L. Fuller, *THE MORALITY OF LAW* (1964) (collecting accounts of the role of social conventions in law).

"imitative," and/or complementary or substitutional with respect to "the market" for the work, under a pattern-oriented approach courts should determine whether the process used by the defendant, framed by language, by social role, and by the place of the subject material in that process, fits some recognized pattern. Both the existence of the pattern and the defendant's place within it must be proved, and that proof ordinarily should consist of mostly objective considerations of language and social or cultural structure. The defendant's subjective beliefs may be relevant, but not determinative.

Among sociologists and anthropologists, the fact that such social and cultural patterns exist appears to be uncontroversial, although their role with society and culture more generally is debated. The sociologist Robert Merton noted "a tendency for, not a full determination of, socially patterned differences in the perspectives, preferences, and behavior of people variously located in the social structure."⁴⁶² Merton himself famously characterized "science" as one such pattern.⁴⁶³ Anthropologists proceed from a related premise, that patterns exist (embodying both meaning and rules for behavior),⁴⁶⁴ and a subdiscipline within anthropology—ethnography—has grown up around methods of investigating them.⁴⁶⁵

It is one thing to declare that patterns exist; it is another to identify them with sufficient precision to make them usable in a model of legal analysis.⁴⁶⁶ At a practical level, lawyers and judges have to

462. Robert K. Merton, *Insiders and Outsiders: A Chapter in the Sociology of Knowledge*, 77 AM. J. SOC. 9, 27 (1972).

463. Robert K. Merton, *The Matthew Effect in Science II: Cumulative Advantage and the Symbolism of Intellectual Property*, 79 ISIS 606, 622-23 (1988) (describing "science" as defined by a set of "socially patterned incentives," distinct from incentives supplied by formal intellectual property law.).

464. See JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 123 (1986); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 12 (1973); DAVID M. FETTERMAN, *ETHNOGRAPHY: STEP BY STEP* 27 (2d ed. 1998). See also Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 42 (2001) (describing culture as "any set of shared, signifying practices"); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1152-53 (1983) (describing culture as patterns of and for behavior within a group, together with attached values).

465. See, e.g., David S. Caudill, *Ethnography and the Idealized Accounts of Science in Law*, 39 SAN DIEGO L. REV. 269 (2002) (suggesting ethnomethodological approach to characterizing "scientific" evidence in legal proceedings).

466. Cf. Sidney Verba, *American Exceptionalism: A Double-Edged Sword*, 91 AM. POL. SCI. REV. 192, 193 (1997) ("The evidence for a cultural pattern is often hard to come by, and it is even more difficult to deploy such evidence in a causal argument....").

work with evidence, not theory. The model needs to account for practical difficulties in distinguishing between genuine and incredible claims that “patterned” use is at work, difficulties that include conflicts in the evidence; differences in characterization based on levels of abstraction and perspective; and burdens of proof. While I cannot specify a response to every contingency, the following sections offer some possible solutions.

a. Language

One important source of evidence of a pattern should be the ways in which we talk. A relevant social or cultural pattern should be characterized by a vocabulary and syntax recognized both by participants in the pattern, and by outsiders. Patterns are cognitive, as well as behavioral.⁴⁶⁷ Language maps deeper cognitive structures and thus mirrors cultural patterns and social structures of which they are a part.⁴⁶⁸ Our initial intuition may be that we experience the world as we do and behave in certain ways because at an important level the semantics and syntax of our language predisposes us to do so.⁴⁶⁹ But at a deeper

467. See MARK TURNER, COGNITIVE DIMENSIONS OF SOCIAL SCIENCE 144-45, 159-62 (2001) (describing the functions of conceptual schema in thought and action); EVIATAR ZERUBAVEL, SOCIAL MINDSCAPES: AN INVITATION TO COGNITIVE SOCIOLOGY (1997); DiMaggio, *supra* note 457, at 269-74 (describing a tentative synthesis of cognitive arguments in sociology that conclude that behavior results from interaction between external rituals and internal mental structures); Paul M. Hirsch, *Sociology Without Social Structure: Neoinstitutional Theory Meets Brave New World*, 102 AM. J. SOC. 1702, 1718-21 (1997) (book review) (noting difficulty of distinguishing between internalized norms, cognitive “scripts,” and social structure in accounts of behavior).

468. See Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1208-10 (2001); Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 782-89 (2002).

469. In its strongest form, this argument is known as the Sapir-Whorf Hypothesis, after the two men most closely associated with it. See EDWARD SAPIR, LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH (1921); EDWARD SAPIR, SELECTED WRITINGS, IN LANGUAGE, CULTURE AND PERSONALITY (David G. Mandelbaum ed., 1949); BENJAMIN LEE WHORF, LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF (John B. Carroll ed., 1956). The “universalist” or strongest form of the hypothesis has not been supported empirically, but its weaker form, known as “linguistic relativity,” argues that manners of speech influence habits of thought and behavior and has been supported in some experimental settings. See Paul Kay & Willett Kempton, *What is the Sapir-Whorf Hypothesis?*, 86 AM. ANTHROPOLOGIST 65 (1984) (reviewing the history of empirical research relating to the Sapir-Whorf Hypothesis); Alan Rumsey, *Wording, Meaning, and Linguistic Ideology*, 92 AM.

level, language,⁴⁷⁰ and in particular, metaphorical uses of language⁴⁷¹ are as reflective of thought and behavior as they are determinative; established and shared uses of language are especially telling because they tap into tacit but shared conceptual structures. In short, we talk as we do because of how we think and act:

Most [semantic] categorization is automatic and unconscious, and if we become aware of it at all, it is only in problematic cases. In moving about the world, we automatically categorize people, animals, and physical objects, both natural and man-made. This sometimes leads to the impression that we just categorize things as they are, that things come in natural kinds, and that our categories of mind naturally fit the kinds of things there are in the world. But a large proportion of our categories are not categories of *things*; they are categories of abstract entities. We categorize events, actions, emotions, spatial relationships, social relationships, and abstract entities of an enormous range: governments, illnesses, and entities in both scientific and folk theories, like electrons and colds.⁴⁷²

Our semantic categories and our metaphors are not mere by-products of, and inputs for, political and legal rhetoric. They are built largely on our experiences,⁴⁷³ including their normative dimen-

ANTHROPOLOGIST 346, 357 (1990) (concluding "in short, language structure and linguistic ideology are not entirely independent of each other, nor is either determined entirely by the other").

In any event, there is a strong intuitive sense that our formal linguistic classifications are related to, and likely influence, our legal classifications. On the role of metaphor in shaping the law, see generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 189-92 (2000) (describing the Supreme Court's repetitive use of a new word in different contexts until its meaning is shaped). On the institutional influence of classification, see generally ISAIAH BERLIN, *CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS* (Henry Hardy ed., 1979); GEOFFREY BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* (1999).

470. See GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987).

471. See, e.g., LAKOFF & JOHNSON, *supra* note 450; LAKOFF & TURNER, *supra* note 450. For a useful recent synthesis of research on metaphor and its application to legal reasoning see Joo, *supra* note 468. On Lakoffian theory and the Internet in particular, see Don Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 469-72 (2003).

472. LAKOFF, *supra* note 470, at 6.

473. This view of language and metaphor does not deny the significance of the Sapir-Whorf Hypothesis, but it limits the argument that the Hypothesis confirms the directionality of

sions.⁴⁷⁴ George Lakoff proposes that metaphoric meanings are mapped to experience on a one-to-one target (metaphor) to source (experience) basis. This thesis has been elaborated by Gilles Fauconnier, with Mark Turner, who argue that we experience overlapping metaphorical frameworks.⁴⁷⁵ Each of these frameworks comprises a “mental space” constructed by a listener or reader and consisting of elements, roles, strategies, and relationships, all of which the listener uses in reasoning and creating meaning. Overlapping “mental spaces” are linked via the process of “cognitive blending,” which accommodates dynamism in the process of understanding.⁴⁷⁶ Querying the extent and stability of a linguistic practice that supports a given pattern is a way of testing the authenticity and depth of the pattern itself.

b. Social Structures

Social and cultural structures can be interrogated directly, of course. Language-based evidence should be corroborated by evidence that the pattern in question has recognized sets of expectations, practices, structures, and roles that exist largely independent of either state-sanctioned coercion or the market itself. The issue here is the extent of limitations on discretionary behavior within a specified social or cultural network, limitations that might be internalized via socialization or professional training, or that might be imposed externally via participation in the pattern, or both. Social “norms” as guides to individual behavior are thus relevant, but they are neither the necessary beginning nor the end of the question. A

language influencing nonlinguistic behavior. *See id.* at 330-34.

474. *See id.* at 65 (“We not only import entities and structure from the source domain to the target domain, we also carry over the way we evaluate the entities in the source domain.”); Pierre Schlag, *Commentary: The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050 (2002) (arguing that “the aesthetic pertains to the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law”); Winter, *Transcendental Nonsense*, *supra* note 457, at 1143-46.

475. *See* Mark Turner & Gilles Fauconnier, *Laughing At and Laughing With: The Linguistics of Humor and Humor in Literature*, in *THE WORKINGS OF LANGUAGE: FROM PRESCRIPTIONS TO PERSPECTIVES* 181, 186-99 (Rebecca S. Wheeler ed., 1999).

476. *See* GILLES FAUCONNIER, *MENTAL SPACES ASPECTS OF MEANING CONSTRUCTION IN NATURAL LANGUAGE* 16-22 (1985); GILLES FAUCONNIER, *MAPPINGS IN THOUGHT AND LANGUAGE* 21-23, 149-92 (1997); Turner & Fauconnier, *supra* note 475, at 186-89.

social or cultural pattern may be defined by informal expectations, customs, and habits, by norms, by more formal organizations, institutions, or hierarchies, by communications and coordination networks, or by a combination of these.⁴⁷⁷ Relevant sorts of evidence may consist of individual practices and behaviors themselves, structures of formal and informal groups, and descriptions of cognitive structures, such as schemata and scripts.⁴⁷⁸ Evidence may be purely contemporary, or may incorporate history and tradition. It is inevitable that the character of such evidence will vary from case to case, and that the influence of law throughout such evidence cannot be removed entirely. But law-and-norms scholars have long concluded that these obstacles provide no insuperable barriers to analyzing law and social structures as distinct phenomena.⁴⁷⁹

In at least one important respect, however, the pattern-oriented approach differs from some common accounts of social norms in law. The approach does not require evidence that the pattern be mapped to repeat-play situations in small, homogeneous, stable communities.⁴⁸⁰ Indeed, scholars note the existence of widely observed practices that likely qualify as norms that arise in nonrepeat-play situa-

477. See Steven A. Hetcher, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 BERKELEY TECH. L.J. 877, 892 n.53 (2001) (adopting a definition of "norm" that is comparable, descriptively, to my use of "pattern"). Cf. W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: THEORY AND RESEARCH 33 (1995) (defining institutions as cognitive, normative, and regulative structures and activities); Jepperson, *supra* note 457, at 145 (characterizing institutions as social patterns that are relatively self-activating).

478. See ROBERT ABELSON & ROGER C. SCHANK, SCRIPTS, PLANS, GOALS, AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES 36-68, 222-37 (1977). For an application of the notion of scripts to the domain of corporate finance, see Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45, 88-91.

479. Since norms are informal by definition, definitions are likewise somewhat "slippery." Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 224 (1994) ("When a public consensus forms that people ought to cooperate, and when enough people internalize the obligation to punish noncooperators effectively, a social norm exists in a community."); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) ("Norms are fuzzy."); see also Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Community*, in SOCIAL NORMS 35 (Michael Hechter & Karl-Dieter Opp eds., 2001); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) ("Roughly speaking, by norms this [law and norms] literature refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.").

480. See ELLICKSON, *supra* note 12, at 67-83.

tions or in communities that are too diffuse to qualify as small or homogeneous.⁴⁸¹ As I use the concept, therefore, social norms are understood more broadly—as a framework that emphasizes norms as sustaining cooperative social arrangements, rather than as providing extralegal sources of coercion. As noted above,⁴⁸² norms of reciprocity may provide compelling evidence of a relevant pattern. But the pattern-oriented approach does not require evidence of reciprocal behavior as such in all cases. It requires commonality of behavior and expectation.

That is, the pattern-oriented approach is concerned partly with the existence of rules governing a group's behavior,⁴⁸³ but it is primarily concerned with the existence of a pattern itself:⁴⁸⁴ Some identifiably, if sometimes loosely, defined set of professional standards or common expectations, with some form of implicit or explicit governance mechanism (paradigmatically, norm-based obligations of reciprocity), and a set of commonly understood objectives. Members of a pattern ordinarily behave in accordance with expectations de-

481. See W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 8-11 (2002). Interrogating rational choice under non-close-knit circumstances, Richard McAdams and Eric Posner supply explanations that account for some non-repeat-play norms. See McAdams, *supra* note 479, at 342-43, 355-433 (arguing that norms are created from individuals' esteem for one another); Posner, *supra* note 479, at 1705-10 (arguing that norms in closely knit communities are based on their signaling function). The best-known account of social conventions posits a similar account of conventions as coordination equilibria for rational individuals. See DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 14-23 (1969).

482. See *supra* note 447 and accompanying text (describing role of reciprocity norms).

483. Investigating the substance of the rules too deeply risks ranking contested versions of "the good life." See Wendel, *supra* note 481, at 53 (2002) (citing CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 80-88 (1989)). In his proposal to reconstruct the fair use doctrine in copyright law in support of a "vision of the good life," William Fisher rejects the strongest forms of this "paternalistic" objection, at least for contexts in which the risks of the errors of paternalism (misidentification of the good life, whether or not in good faith) are low, and its benefits (increasing the scope of access to the good life, taking account of individuals' opportunities for self-determination) are high. See Fisher, *supra* note 15, at 1762-66.

484. Some philosophers query the extent to which social practices, as a conceptual category with normative content, are distinct from social behaviors, the manifestations of action. See Michael Esfeld, *What are Social Practices?*, in 1 INDAGA: REVISTA INTERNACIONAL DE CIENCIAS SOCIALES Y HUMANAS 19, 19-43 (2003). Esfeld posits three possible relationships: that the two are identical; that practices are mediated by norms, becoming behaviors; or that practices are irreducibly distinct from behaviors. *Id.* To the extent that my argument suggests that I should choose among these, the first position seems to be the most likely to be consistent with a pragmatic focus on the relatedness of thought, language, and behavior.

financed by the pattern and can ordinarily make normative claims upon one another by virtue of their being part of the pattern.

The task in any given case, then, is to query the existence of rules, norms, scripts, customs, institutions, hierarchies, and coordination mechanisms, and so forth, that substantively track the vocabulary and syntax that are linguistically established. In the vast majority of fair use cases, much of this foundational work is already complete; there is a rich literature and an abundance of expert witnesses available to testify to the character of research, teaching, scholarship, criticism, journalism, parody, and satire, for example. The question in such cases will not be whether the pattern exists, but whether the use in question is consistent with the established usages and practices of the pattern. The discussion of leading cases in Part III suggests that this is the analytic question on which courts have, in fact, labored the hardest, often without recognizing that they are doing so. Indeed, it is precisely such evidence that the court found lacking in the *Aimster* litigation,⁴⁸⁵ and that was present and persuasive in *SunTrust Bank v. Houghton Mifflin Co.*⁴⁸⁶

It is important to note that the proposed focus on patterns acknowledges its epistemological limitations. Patterns, norms, and so forth may evolve, and the law-and-norms literature has debated at length whether the law of a given discipline should formalize a relationship with social norms.⁴⁸⁷ As a practical matter, there is concern that the law's reliance on norms may tend to freeze the law in its own existing patterns, and may stifle the development of new social patterns and of individual variation.⁴⁸⁸ Equally important, there is

485. See *supra* note 78 and accompanying text.

486. See *supra* note 429 and accompanying text.

487. Law that relies on norms is accused of interfering with effective regulation by norms. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796-1815 (1996). Different legal rules may evoke different norm responses, presenting choices for policymakers that norm-based systems cannot evaluate alone. See, e.g., Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000); Eric Posner, *supra* note 480. Scholars have invoked norms to explain and predict behavior both in light of changes to legal rules, and in the absence of legal rules, suggesting that we know less than we believe we do about the actual dynamics of their interaction. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1628-30 (2000); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

488. From a social welfare perspective, there is the risk that confirming norms as law risks recognizing and rectifying inefficient or at least nonwelfare-maximizing rules. See, e.g., Gordon, *supra* note 15, at 1621-22 (arguing that recognizing a custom of uncompensated use

the question of whether it is logically possible to distinguish law and norm.⁴⁸⁹ Patterns are not purely exogenous to the legal systems that they inhabit.⁴⁹⁰ But as social scientists have done, I assume here that there is some identifiable extent to which cultural patterns and practices exist autonomously in society, and that there is a meaningful extent to which they are both stable enough to be relevant referents in this context and sufficiently flexible to be useful in responding to particular fair use issues as they arise,⁴⁹¹ and adaptive

might inhibit the creation of new markets for copyrighted works); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, 383 (1997); McAdams, *supra* note 479, at 412-16; Posner, *supra* note 479, at 1743. Compare Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996) (suggesting that efficiency of norms justifies embodying them in commercial institutions) and Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 124-28 (1992) (arguing that courts should enforce stable industry custom in the intellectual property context), with Bernstein, *supra* note 487, at 1794 (claiming that efficiency of norms commends noninterference by the legal system) and Stephen L. Carter, *Custom, Adjudication, and Petrushevsky's Watch: Some Notes From the Intellectual Property Front*, 78 VA. L. REV. 129, 131-32 (1992) (expressing skepticism regarding prescriptive implications of Epstein's argument).

In other circumstances, legal enforcement of a social norm might conflict with relevant policies of a legal system based on respect for individual self-determination, or idiosyncrasy. See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 58 (2001):

Norm-based fair use defaults, however, are subject to many of the same criticisms as negotiated fair use defaults. Such defaults still would be inflexible at the margin, and still would not encompass the full range of uses that a court would hold fair. Thus, if norm-based controls were regarded as implementing a fair use ceiling rather than a fair use floor, users of digital works would enjoy far less fair use than they have enjoyed in traditional media.

Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1216-17 (1998) (warning that excessive conformity to social norms may result in suppression of ability to challenge "the status quo and to experiment with alternative conceptions of the good life"); see also Okediji, *supra* note 14, at 121-24 (expressing skepticism of custom-based fair use arguments).

489. Margaret Radin, Polk Wagner, and others have reprised the foundational objection to legal ratification of social norms, arguing that such norms often depend on enforcement of underlying contract and property entitlements and thus ought not to be regarded as truly independent of a legal system that interrogates their existence as informal sanctions. See Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295 (1998). True and complete independence is not required here, even if it is possible.

490. See Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives on the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 492 (noting the weakness in institutional arguments about law that accept the law as "just is").

491. For example, it is likely not the case that every individual who is part of a given

enough to support and respond to changes in both law and society over time.⁴⁹² Pragmatically speaking, the influence of law and norms on one another is inevitable. The question is how to make rational sense of this relationship. In Part I, I quoted Robert Post, a First Amendment scholar, on the point that law should be understood with reference to communities of practice, on which it depends and which it shapes.⁴⁹³ I take Professor Post to suggest that it is inevitable that the law validate certain forms of social organization and not others, and not that forms of social organization have no identity or validity without the imprimatur of the law. Journalism, scholarship, and criticism are organized into communities of practice that would be surprised by the suggestion that they rely on the legal system for legitimacy. Yet by the same token, many of the informational privileges they enjoy are indeed validated by the law. With fair use, among other doctrines, the law identifies which patterns and practices to recognize.⁴⁹⁴

The inevitable interdependence of law and social and cultural patterns is not a complete answer here, however, because some philosophers and social scientists question the conceptual integrity of the notion that there exist patterns (or practices, or social structures) that are meaningfully distinct from individual belief and action.⁴⁹⁵

pattern has an equivalent interest in the kinds of uses of expressive works that the pattern encounters. See, e.g., Peter H. Gray & Darren B. Meister, *Task and Technology Fit: Lessons from Knowledge Sourcing Technologies*, Minnesota Knowledge Management Symposium (2003) (describing different knowledge sourcing interests of individuals at different levels of employment hierarchy).

492. At least some norm-based regulation may not be as inflexible as some fear. Many scholars have dealt with the question of whether incorporation of custom into law tends to promote rigidity or flexibility. Compare Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (or "*The Economics of Boilerplate*"), 83 VA. L. REV. 713 (1997); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); and Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 867-68 (2000) (all arguing that reliance on custom tends to promote rigidity), with Omri Ben-Shahar, *The Erosion of Rights by Past Breach*, 1 AM. L. & ECON. REV. 190, 227-29 (1999), and Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781 (1999), and Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT'L L. 707, 732-40 (1999) (all suggesting reasons why flexibility will be preserved).

493. See *supra* notes 18-19 and accompanying text.

494. See *supra* Parts II.C.3, II.C.5.c, II.C.2, II.C.4.b.

495. See JOHN R. SEARLE, *MIND, LANGUAGE, AND SOCIETY: PHILOSOPHY IN THE REAL WORLD*

A defense of the pattern-oriented approach thus requires a brief survey of scholarship that tries to resolve tension between the alleged primacy of the actor, and the alleged primacy of the pattern. In short, there is persuasive evidence that it is indeed meaningful to look to social and cultural phenomena. Anthony Giddens does so with his "structuration" thesis, positing that individuals (particular actions) and groups (rules) are functionally inseparable because they are in the ongoing process of simultaneously constructing each other.⁴⁹⁶ Margaret Gilbert argues that we can and do meaningfully ascribe purposes and beliefs to social groups, consistent with everyday understanding, so long as members of a social group genuinely refer to themselves as "we" (the linguistic dimension) and make normative claims upon each other by virtue of group association (the sociological dimension).⁴⁹⁷

The cognitive perspective offered above, in connection with the relevance of language connects this abstract argument with the pragmatic problem at hand. Individual preferences are not objectively given and relied upon via acts of individual intent to build larger social structures. Intentionality is itself contextual, making social groups and structures (patterns) an inherent part of social analysis. Mark Johnson explains in terms that crystallize the patterns-approach for fair use purposes:

(1998) (integrating philosophical and linguistic analyses in concluding that individuals, via shared intents, use language to construct society); *supra* note 18 (listing observations on the problems of endogenous preferences). Efforts by philosophers to reconcile the focus on the individual with the intuition that group action is relevant have produced related theories describing "collective intentionality" ascribed to social groups. See RAIMO TUOMELA, *THE PHILOSOPHY OF SOCIAL PRACTICES: A COLLECTIVE ACCEPTANCE VIEW* 2 (2002) (arguing that social practices, including customs, traditions, and norms, develop and evolve via a weak form of "collective intentionality"); *cf.* THEODORE R. SCHATZKI, *SOCIAL PRACTICES: A WITTGENSTEINIAN APPROACH TO HUMAN ACTIVITY AND THE SOCIAL* (1996) (arguing that social practices are the fundamental phenomenon in social life).

496. See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 162 (1984). *Cf.* TALCOTT PARSONS ON INSTITUTIONS AND SOCIAL EVOLUTION: *SELECTED WRITINGS* (Leon H. Mayhew ed., 1983) (describing "action" theory); *supra* notes 454-55 and accompanying text (describing Bourdieu's concept of the *habitus*). The "structuration" thesis may not adequately explain the process of changing social structures, but for present purposes it provides a helpful account that distinguishes and integrates the idea of independently significant social structures. Giddens' critic Margaret Archer argues for two distinct levels of reality—the self and (external) social structure—that are linked via individual actions. See MARGARET S. ARCHER, *REALIST SOCIAL THEORY: THE MORPHOGENETIC APPROACH* (1995).

497. See MARGARET GILBERT, *ON SOCIAL FACTS* 205, 380-81 (1989).

[A]ny statements we make, any directives we give, any rules we lay down are applicable, not because the concepts specify their own determinate conditions of satisfaction, but rather because we understand these concepts and rules relative to shared idealized cognitive models, scripts, and narratives that are tied to embodied experiences, communal histories, practices, and values. The rules can work, when they work, precisely because of these framing cognitive models and practices. They are not ... merely non-propositional, non-semantic background assumptions. Rather, they are part of our conceptual apparatus by which we make sense of and act purposively within concrete situations.⁴⁹⁸

The question is not whether the action of the individual is the result of individual intent or is constrained completely by social influences, but instead the character of the cognitive framework within which the individual is acting. To what extent are the individual's actions consistent with, inconsistent with, or otherwise connected to that framework? The cognitive perspective, including its linguistic component, confirms that social patterns can be identified and made relevant to analysis of social questions. The fact that courts have implicitly been doing much of this confirms that it can be done. Recognizing it explicitly means teaching courts to accept their role, and teaching lawyers to more systematically collect and introduce both expert and lay evidence that tracks the language, structure, and practices of a given pattern. There is skepticism in some quarters about the competence of the judiciary to identify and interpret social practices meaningfully.⁴⁹⁹ Courts certainly could do a better

498. Mark Johnson, *Law Incarnate*, 67 BROOK. L. REV. 949, 957 (2002); see also Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms Jurisprudence*, 43 SANTA CLARA L. REV. 389, 394 n.10 (2003):

[T]oo sharp a dichotomy between methodological individualism and holism appears problematic under careful analysis.... [B]ecause virtually everything that we do in the course of everyday task-performance reflects a division of cognitive labor within society, in many ways it makes little sense to sharply distinguish individual cognition ... from more systemic forms of cognitive processing ...; what needs to be explained is the complex interrelationship between the two.

Id.; see also ZERUBAVEL, *supra* note 467, at 5-6.

499. Stephen Carter developed the metaphor of "judge as anthropologist" in order to criticize it. See Carter, *supra* note 488, at 132.

job of this than they have done in the past.⁵⁰⁰ But the admonition that this is not a judicial function is off the mark; weakness in decision making arises not because judges are institutionally incapable of identifying and interpreting social practices, and in any event, judges ordinarily ought not to be asked to do so without help. The investigation that I suggest be pursued ought, in the first instance, to be the task of the parties. Judges rarely need to be anthropologists. Lawyers do, and they do so all the time. Creating a proper record is, among other things, an anthropological or archaeological exercise. A proper record goes a long way to good judicial decision making, and having a coherent set of questions to ask goes a long way toward making a proper record.

This point may seem to beg the question of how courts are supposed to evaluate this pattern-oriented evidence. Problems of characterization and generality cannot be avoided. Good lawyers are masters of storytelling, and what I argue should be objective evidence of genuine patterns and practices may be treated as mere stories. Or (perhaps) worse: mere stories may be presented in the guise of "objective evidence."

I confess to being untroubled by either possibility, given the state of fair use law and argument today. Copyright law *is* full of stories, and compelling accounts of patterns may indeed be presented using rhetorical and narrative flourishes.⁵⁰¹ From an argumentative

500. The need to look more critically at distinctions between technological artifacts and social patterns in which they are embedded is not limited to fair use, or to copyright law. See Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99 (2000) (regarding software patents); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281 (2003) (regarding technological access controls for copyrighted works); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002) (regarding electronic contracts); John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139 (1999) (regarding business methods patents). Although arguments of this sort may be associated most often with efforts to sustain the legality of various technologies, they also appear in contrary arguments. Compare Alfred C. Yen, *What Federal Gun Control Can Teach Us About the DMCA's Anti-Tampering Provisions*, 2003 WIS. L. REV. 649, with Peter Biddle et al., *The Darknet and the Future of Content Distribution*, available at <http://crypto.stanford.edu/DRM2002/darknet5.doc> (last visited Oct. 19, 2003) (arguing that technologically focused regulation of P2P systems is likely to fail).

501. See Michael J. Madison, *Where Does Creativity Come From? And Other Stories of Copyright*, 53 CASE W. RES. L. REV. 747 (2003); cf. Jaber F. Gubrium & James A. Holstein, *At the Border of Narrative and Ethnography*, 28 J. CONTEMP. ETHNOGRAPHY 561, 568-69 (1999) (describing challenge for ethnographers in balancing objective analysis with legitimate narrative analysis, since narratives themselves are socially patterned).

standpoint, it is better that proponents of fair use defenses be as well-armed as proponents of copyright enforcement. From an analytic standard, connecting the patterns approach to conventional narrative techniques gives extra weight to the former and structure to the latter. The bottom line is this: A fair use defense advanced in good faith under a banner of conformity with a social or cultural pattern input, ordinarily, ought to be accepted.

2. Patterns and § 107

Even as a descriptive matter, the pattern-oriented approach does not succeed if it cannot be reconciled with the language of § 107. Part II of this Article opened with a description of the analytic conundrums that the statute presents. Part III described how a pattern-oriented approach was consistent with Congress' intention in enacting § 107. Here, I suggest that the pattern-oriented approach offers a plausible route to reconciling the problems of the statutory text itself.

Beginning with the preamble and continuing through each of the four factors of the statute, the pattern-oriented approach offers a method of synthesizing differences in perspective and accepting their apparent redundancies. With respect to the preamble's list of apparently favored uses, each of these, as I suggested above, represents the type of traditionally recognized patterns that can be described credibly if not definitively according to the linguistic and sociological arguments reviewed above.⁵⁰² Justice Blackmun's proposed reconciliation of those uses, that "productive" use should guide fair use decisions,⁵⁰³ is thus off the mark, but only slightly. The relevance of the list⁵⁰⁴ is that each of the uses describes a pattern, rather than an inherently "productive" use. All of us as readers, viewers, and listeners know that there is an abundance of unproductive journalism, criticism, scholarship, and teaching floating around in the world. The difference between deterministically "productive" use and probabilistically "creative" use is subtle but important, particularly as I develop it further in Part V. For present pur-

502. See *supra* Part IV.A.1.

503. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 479-80 (1984).

504. See 17 U.S.C. § 107 (2000).

poses, note the consistency of the pattern-oriented approach with the language of the preamble.

Justice Blackmun's proposal is correct in a different sense, in suggesting that the preamble be read together with all four factors of the statute, rather than simply with reference to the first factor.⁵⁰⁵ That concern, the purpose and character of the use, should be read as an inquiry into whether the particular use of the work enjoyed by the defendant is consistent with the social or cultural pattern in which the defendant is engaged. If the defense is that the use is fair because it is "journalistic," for example, there are two related questions: first, is the defendant engaged in the practice of journalism, and second, is the use of the work a credibly "journalistic" one?

The second factor, the nature of the copyrighted work, should be viewed not as an invitation to pass independently on the "creativity" inherent in the plaintiff's work (with its concomitant but inappropriate implication that more "creative" works are somehow deserving of "more" copyright protection), but instead as a basis for understanding the nature of the resources that typically are consumed in different patterns. A novel may or may not be more "creative" than an insurance claim form, but the comparison involves apples and oranges. One needs to know whether the "creative" novel is being used in the preparation of a news story or feature article, a book review, or a film. Critics presumably have a greater interest in the unauthorized excerpting of novels than do either most journalists or movie producers. Criticism rarely passes for criticism if it is licensed by the author of the work(s) criticized; journalists rarely draw on fiction as source material; and film producers typically are no worse off if they must rely on the market for access to material on which to base feature films.

The "amount and substantiality"⁵⁰⁶ of the portion used, the third factor, can now be treated distinctly: even a critic, who is credibly engaged in a critical practice, must abide by the norms of criticism in quoting from the work under study. Reproducing too much of the material at stake violates the "amount and substantiality" standard,⁵⁰⁷ measured not solely quantitatively or even qualitatively

505. *See id.* § 107(1); *Sony Corp.*, 464 U.S. at 495-99.

506. 17 U.S.C. § 107(3) (2000).

507. *Id.*

against the plaintiff's work, but on a comparative basis, against both the plaintiff's work and the defendant's process.⁵⁰⁸ A book that might be quoted extensively and fairly in a book review might be "quoted" fairly to a much smaller extent in a film or song.

How to interpret the market impact of the use, the fourth factor, also becomes clear. Recall the flaw in the reasoning of the Court in *Campbell*, that market injury from parody or criticism should not count in the fair use calculus,⁵⁰⁹ but that credible market injury might nonetheless be discerned from the rap parody of "Oh, Pretty Woman."⁵¹⁰ Credible evidence of market injury in that case would demonstrate not the existence of infringement despite a confirmed claim of parody, but that the work was not really a parody at all. Credible evidence of substitution of the defendant's work for the plaintiff's, in whole or in part, might demonstrate that the defendant's claim to be following an established practice rings hollow. The corollary, then, is that the plaintiff should always bear the burden of proof with regard to substitutional injury, just as the plaintiff ordinarily bears the burden of demonstrating injury from infringement in the first place.

Using the pattern-oriented approach to link the different strands of § 107 also helps to frame the scope of the evidentiary challenge that the approach presents. It should be clear from the foregoing review of the statute that much of the evidence and argument with respect to each of the separate factors will remain relevant, though its ultimate use will be reframed in light of the overall thrust of the approach. Searching for linguistic and structural clues to social patterns, as the approach requires,⁵¹¹ may seem daunting in the abstract. The approach makes relevant some evidence that might not have been canvassed previously, but much of existing practice regarding the types of information to collect under § 107 should remain the same.

508. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565-66 (1985) (noting that the amount and importance of copyrighted material must be evaluated in both the plaintiff's and defendant's works when deciding if there has been actionable copyright infringement).

509. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-92 (1994).

510. See *id.* at 592-93.

511. See *supra* notes 499-500 and accompanying text (describing character of evidence made relevant under the approach, and noting the limited "anthropological" burdens that the approach imposes on courts and lawyers).

B. The Pattern-Oriented Approach and Patterns in the Law

To this point I have argued that the fair use doctrine, properly understood in terms of the leading cases and its statutory form, is explained best as an analytic tool that focuses on social and cultural patterns. This section briefly considers whether that explanation is consistent with a broader group of decided cases. I conclude that it is, with some important exceptions.

I reviewed published, final decisions concerning fair use issued by courts of appeal after the fair use statute came into effect in 1978 and before the end of 2003. I included sixty-seven opinions in all, excluding appellate opinions rendered in the *Harper & Row*, *Sony*, and *Campbell* cases themselves,⁵¹² with the goal not of reaching a statistically rigorous analysis but of sampling enough opinions to obtain a rough gauge of the adequacy of the pattern explanation.⁵¹³ I examined each case to determine whether the outcome of the case with respect to a fair use claim could be predicted from the court's characterization of a relevant pattern of conduct in which the defendant(s) were engaged. Though in some respects the analysis resembles examining each court's review of the first statutory fair use factor, it turns out that in the vast majority of the cases, the court's pattern analysis (even if rarely acknowledged in those terms) differs slightly but importantly by focusing not only on the end product of the defendant's efforts but also on the processes that the defendant used. That approach, which seems to be entirely consistent with the label fair "use," colors judicial approaches to all four statutory factors. Finally, I should make clear that the pattern-oriented approach is related to but does not depend on arguments about the existence of customs within or without a given industry or whether fair use should be treated as a "customary" right. A handful of courts in fair use cases, particularly those involving the preparation of unauthorized biographies, have weighed biographers' customs in

512. I discuss these at length elsewhere in the Article. See *supra* Part II.C.1-3. Additionally, all three of the cases were ultimately decided by the Supreme Court.

513. I focused on appellate opinions and excluded (the much larger number of) trial level opinions on the ground that in traditional jurisprudential terms, the former are intended to be and are likely to be treated as precedential to an extent that is unlikely for most trial level opinions. In the main, a large number of appellate opinions addressing fair use have had significant analytic impact on later cases; the same cannot be said of most trial level opinions.

favor of fair use. As I discuss below, the pattern-oriented approach would recharacterize the equivalent question as a matter of pattern and thus a question of potentially broader scope than custom.

Each of the subsections below collects and describes fair use cases that can be measured against a social or cultural pattern that is capable of definition with sufficient specificity to make judicial application of a pattern-oriented approach credible and sensible. That is, I argue, that each of the categories identified below consists of a definable pattern existing at least largely *ex ante* and without reference solely to fair use cases that take it as a reference—even where it is inevitable that the pattern is reinforced by its reception by law.

“Journalism,” the first category, embodies widely recognized norms (“All the News That’s Fit to Print”), practices (get it right, but get it first), and roles (reporter, editor, publisher) associated with and disseminating “news.”⁵¹⁴ The practice of parody and satire, the second category, has been defined by scholarly analysis going back centuries.⁵¹⁵ Scholarship itself, the third category, has been analyzed as a distinct discipline.⁵¹⁶ The roles of “critic,” and “reverse engineer” have been distinguished within the traditions of study.⁵¹⁷ As for the final categories discussed, norms, roles, and practices associated with legal and political argument, and with narrative construction, extend to ancient Greece.⁵¹⁸ Of the patterns reviewed here, “comparative advertising” seems to have the shallowest pedigree—though marketing and advertising education are both professionalized in the university setting (a social structure suggesting the existence of a pattern or practice-based curriculum), and are

514. See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44, 57 n.18 (D.D.C. 1998) (noting that Internet gossip columnist was not entitled to benefit of “news gathering exception” to long-arm statute).

515. See Ochoa, *supra* note 166, at 548-64.

516. The copyright status of the university professor has been analyzed in pattern-oriented terms. See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416-17 (7th Cir. 1988) (concluding that applying the work-made-for-hire doctrine to university professors would wreak “havoc” on “the settled practices of academic institutions”).

517. See, e.g., DAVID KIRBY, *WHAT IS A BOOK?* (2002) (discussing “What is a Critic?”); Iyad Zayom & Timothy C. Lethbridge, *A Cognitive and User Centric Based Approach for Reverse Engineering Tool Design*, in *PROCEEDINGS OF THE 2000 CONFERENCE OF THE CENTRE FOR ADVANCED STUDIES ON COLLABORATIVE RESEARCH* (2000) (describing proposal to design software tools for use in reverse engineering by tracking engineers’ practices).

518. The classic and obvious original sources here are Aristotle’s *RHETORIC* and *POETICS*.

the object of legal regulation (suggesting the existence of a body of norms).

One might break out any of these categories—or patterns—and elaborate on these summary descriptions. The result of such an exercise would likely be to reinforce the notion that these represent one set of socially, culturally, and legally relevant patterns. Other patterns are recognized elsewhere in copyright law,⁵¹⁹ and there is evidence—described in Part IV.C.5, that additional patterns are developing and being recognized.

1. *Journalism and News Reporting*

The discussion of the three *Los Angeles News Service* cases captures the way in which one court treated different claims of “news reporting” as fair use.⁵²⁰ In other cases, courts have been equally skeptical that “news reporting” uses of copyrighted material constituted fair use, unless the invocation of the “journalism” label was accompanied by other contextual suggestions that real journalism was afoot. Reproduction of a model’s photograph on a newspaper’s front page was held to be fair use in *Núñez v. Caribbean International News Corp.* because the photograph was necessary to tell a story in which the paper’s readers had a substantial and legitimate interest.⁵²¹ The argument that the defendant was acting as a publisher of the news, in selecting, editing, and presenting information, justified findings for the defense in *Diamond v. Am-Law Publishing Corp.*⁵²² and *Consumers Union of United States, Inc. v. General Sig-*

519. See *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145-47 (2d Cir. 1987) (deciding question of “separability” under copyright’s useful article doctrine based on evidence of “artistic judgment” involved in object’s production).

520. See *supra* Parts II.C.4.b, II.C.5.c.

521. See *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000), noting that: Puerto Ricans were generally concerned about the qualifications of Giraud for Miss Puerto Rico Universe, as is demonstrated by the several television shows discussing the photographs. This informative function is confirmed by the newspaper’s presentation of various news articles and interviews in conjunction with the reproduction. Appellee reprinted the pictures not just to entice the buying public, but to place its news articles in context; as the district court pointed out, “the pictures were the story.” It would have been much more difficult to explain the controversy without reproducing the photographs.

522. 745 F.2d 142, 147-48 (2d Cir. 1984) (rejecting copyright claim against magazine that edited the plaintiff’s letter to the editor).

*nal Corp.*⁵²³ By contrast, cases rejecting fair use defenses raised by news gathering and distributing organizations did so almost universally on the ground that the use in question exceeded the scope of "legitimate" or "credible" journalism.⁵²⁴

2. *Parody and Satire*

As in *Dr. Seuss Enterprises* and *SunTrust Bank*, virtually all of the decided cases involving claims of parody as fair use have relied heavily on whether the steps leading to preparation of the allegedly infringing work could be situated fairly within a tradition of parody. Parody brings its targets down to earth. In some circumstances, therefore, courts have noted that where the plaintiff's work takes on an air of exaggerated self-importance, the preparation of a parody is virtually inevitable. In *Leibovitz v. Paramount Pictures Corp.*,⁵²⁵ the court found that the defendant's take-off on the plaintiff's posed

523. 724 F.2d 1044, 1049-50 (2d Cir. 1983) (rejecting copyright claim against advertiser that reproduced product rating information without rater's permission). Though the claim nominally concerned use of the copyrighted work in an advertising context, the court's decision adopted the language of the news:

CU cannot prevent Regina from accurately reporting facts about the results of CU's independent testing, irrespective of Regina's motive in doing so. Regina wants to communicate CONSUMER REPORTS' favorable rating of its product. Regina uses CU's words in the interest of accuracy, not piracy. Where an evaluation or description is being made, copying the exact words may be the only valid way precisely to report the evaluation.

Id.

524. See *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (finding that "the abstracts [prepared by the defendant] are for the most part direct translations of Nikkei articles; defendants added almost nothing new in their works"); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 993-94 (9th Cir. 1998) ("Reuters copies footage and transmits it to news reporting organizations; Reuters does not explain the footage, edit the content of the footage, or include editorial comment."); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121-23 (9th Cir. 1997); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 797-98 (9th Cir. 1992); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) ("The purpose and character of TV News Clips' use of WXIA's work heavily influences our decision in this case. TV News Clips copies and distributes the broadcast for unabashedly commercial reasons"); *Rubin v. Boston Magazine Co.*, 645 F.2d 80, 83-84 (1st Cir. 1981) (rejecting "journalism" defense where magazine merely reprinted the findings of plaintiff's dissertation research); *Iowa State Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60-61 (2d Cir. 1980) ("The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.").

525. 137 F.3d 109, 112-15 (2d Cir. 1998).

nude photograph of the actress Demi Moore constituted a noninfringing parody, largely on the ground that “[a] photographer posing a well known actress in a manner that calls to mind a well known painting must expect, or at least tolerate, a parodist’s deflating ridicule.”⁵²⁶ Similarly, in *Mattel, Inc. v. Walking Mountain Productions*,⁵²⁷ the court affirmed a summary judgment of noninfringement against a photographer whose “Food Chain Barbie” photographs took aim at a target that was “ripe for social comment.”⁵²⁸ The defendant bolstered his contention that he intended to parody Barbie with expert testimony that his photographs fell within the traditions of twentieth-century artists.⁵²⁹ The court’s weighing of the fair use factors reflects a strong sense that the defendant had invoked a recognized pattern of parody and was operating genuinely within it.⁵³⁰

Often, but not necessarily, parody is simply funny. In *Fisher v. Dees*⁵³¹ and *Elsmere Music, Inc. v. National Broadcasting Co.*,⁵³² courts rejected infringement claims on the ground that the parodies were sufficiently funny (the lyrics to “When Sonny Sniffs Glue” substituting for the original pop tune “When Sonny Gets Blue” in the former,⁵³³ and “I Love Sodom” for the advertising jingle “I Love New York” in the latter⁵³⁴) that parodies of the original works must have been intended by the defendants.⁵³⁵ Cases that rejected claims that the defendant’s work constituted a parody of the plaintiff’s did so on the basis that the invocation of the “parody” label was not

526. *Id.* at 114-15.

527. 353 F.3d 792 (9th Cir. 2003).

528. *Id.* at 802.

529. *See id.* at 797.

530. *See id.* at 801-04.

531. 794 F.2d 432 (9th Cir. 1986).

532. 623 F.2d 252 (2d Cir. 1980).

533. *Fisher*, 794 F.2d at 436, 438.

534. *Elsmere Music*, 623 F.2d at 253.

535. *See Fisher*, 794 F.2d at 436 (“Although we have no illusions of musical expertise, it was clear to us that Dees’s version was intended to poke fun at the composers’ song, and at Mr. Mathis’s rather singular vocal range.”); *Elsmere Music*, 623 F.2d at 253 n.1 (“A parody is entitled at least to ‘conjure up’ the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary.”). The court in *Elsmere Music* did not engage in an extended discussion of fair use but instead relied heavily on the opinion of the district judge, finding no infringement. *See Elsmere Music*, 623 F.2d at 253.

enough, without credible compliance with norms and traditions associated with parody, to avoid an infringement claim.⁵³⁶

3. Criticism and Comment

Parody is in many respects merely a specialized version of criticism and comment. Its recognition as a distinct pattern of "fair use" has emerged only relatively recently. A separate group of cases classed as criticism and commentary, without the specialized "parody" label, itself divides along lines gauging whether or not the defendant has engaged in "real" criticism. The recent case of *Ty, Inc. v. Publications International, Ltd.* ruled that a guidebook collecting pictures and descriptions of the plaintiffs' stuffed Beanie Baby toys constituted fair use of the works embodied in those toys.⁵³⁷ The court concluded that the guidebook amounted to valid evaluation or criticism of the toys:

Indeed, a collectors' guide is very much like a book review, which is a guide to a book and which no one supposes is a derivative work. Both the book review and the collectors' guide are critical and evaluative as well as purely informational; and ownership of a copyright does not confer a legal right to control public evaluation of the copyrighted work.⁵³⁸

536. See *Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir. 1992) (rejecting Jeff Koons' argument that his "Puppies" sculpture was a postmodern commentary on the kitsch of plaintiffs' "String of Puppies" photography, since Koons did not do enough to signal independence of original and parodic works); *MCA, Inc. v. Wilson*, 677 F.2d 180, 184-85 (2d Cir. 1981) (rejecting fair use defense on the ground that the "parody" argument was a post-hoc rationalization of the composition "The Cunnilingus Champion of Company C"); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757-58 (9th Cir. 1978) (rejecting parody defense where defendant copied more than parodist would have needed to conjure the original work). One might justly criticize the results in some or all of these cases, along with the more recent decision in *Dr. Seuss Enterprises*, on the ground that the decisions offer an overly narrow view of parody itself, even taking the parody/satire distinction at face value. *Dr. Seuss* shows, however, that even the intervening decision in *Campbell* would not necessarily have led to different outcomes in any of them. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399-400 (9th Cir. 1997).

537. 292 F.3d 512, 518-21 (7th Cir. 2002).

538. *Id.* at 520-21.

The court distinguished the case from two previous decisions rejecting fair use claims raised under color of critical or evaluative use,⁵³⁹ *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*⁵⁴⁰ and *Twin Peaks Productions, Inc. v. Publications International, Ltd.*,⁵⁴¹ each of which concluded that the claim of criticism was not credible. In *Castle Rock Entertainment*, the court decided that the argument was (as in *Dr. Seuss Enterprises*) a post-hoc rationalization.⁵⁴² In *Twin Peaks*, the court noted that the defendant had copied far more of the plaintiff's work than typically would be appropriate for a review or commentary.⁵⁴³ Judge Posner's opinion in *Ty, Inc.* goes further and criticizes the reasoning of *Castle Rock*, in particular, for indulging judicial sensibilities regarding the aesthetic merit of the defendant's work. Judge Posner reiterated this theme in *Chicago Board of Education v. Substancem Inc.*,⁵⁴⁴ in ruling that a critic of copyrighted standardized tests could not publish tests wholesale under a claim of fair use:

[T]he fair use copier must copy no more than is reasonably necessary (not strictly necessary—room must be allowed for judgment, and judges must not police criticism with a heavy hand) to enable him to pursue an aim that the law recognizes as proper, in this case the aim of criticizing the copyrighted work effectively.⁵⁴⁵

In so doing, he offers a pungent summary of the case against characterizing legitimate criticism too narrowly.⁵⁴⁶ In the end, however, it is important to note that the case for fair use in *Ty, Inc.* is the same as the case against fair use in *Castle Rock*. In each, the decision turned on what the court determined to be (or not to be) "real" criticism.

539. *Id.* at 522-23.

540. 150 F.3d 132, 142-43 (2d Cir. 1998).

541. 996 F.2d 1366, 1374 (2d Cir. 1993).

542. See *Castle Rock Entm't*, 150 F.3d at 142 (finding that the challenged book's "purpose, as evidenced definitively by the statements of the book's creators and by the book itself, is to repackaging *Seinfeld* to entertain *Seinfeld* viewers").

543. See *Twin Peaks Prods.*, 996 F.2d at 1376.

544. 354 F.3d 624 (7th Cir. 2003).

545. *Id.* at 629.

546. See *Ty, Inc.*, 292 F.3d at 523.

The focus on critical process rather than result is also evident in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, in which Jerry Falwell was exonerated of a charge of copyright infringement when his Moral Majority newsletter reproduced the Hustler cartoon that Falwell previously (and unsuccessfully) had used as the basis for a libel suit. This case has been characterized as perhaps the leading example of the maxim, "what is sauce for the goose is sauce for the gander."⁵⁴⁷ But the court's analysis itself, while clearly susceptible to that interpretation, on its own terms relies heavily on the defendant's process of preparing and conducting a commentary on his accuser.⁵⁴⁸

Less colorful examples of the criticism pattern supporting a fair use argument are *Association of American Medical Colleges v. Cuomo*, in which the court sustained the validity of a New York state law that required disclosure of test questions by publishers of standardized educational tests,⁵⁴⁹ and *Maxtone-Graham v. Burtchaell*, in which an anti-abortion advocacy group was permitted to use material prepared by a pro-abortion group in writing an anti-abortion book.⁵⁵⁰ Answering the argument that copyrights in the tests would be infringed by public disclosure of the questions, the court in *Association of American Medical Colleges* concluded that such disclosure would amount to criticism or comment, protected as fair use.⁵⁵¹ The court in *Maxtone-Graham* likewise characterized the defendant as having acted properly in the mode of critic:

Burtchaell's work takes portions of the [plaintiff's] free form interviews and organizes them into a topical framework to make the case against abortion. One need not agree with the merit, methodology or conclusions of [the defendant's work] *Rachel Weeping* to recognize that Burtchaell applied substantial intellectual labor to the verbatim quotations, continually offering his own insights and opinions.⁵⁵²

547. *Hustler Magazine, Inc. v. Moral Majority*, 796 F.2d 1148, 1151-56 (9th Cir. 1986).

548. *See id.* at 1153.

549. 928 F.2d 519, 525-26 (2d Cir. 1991).

550. 803 F.2d 1253, 1260 (2d Cir. 1986).

551. *Ass'n of Am. Med. Colls.*, 928 F.2d at 524.

552. *Maxtone-Graham*, 803 F.2d at 1260.

It has been said both that the fair use inquiry sometimes wrongly balances the relative “creativity” offered by the two parties, and the Supreme Court in strong terms has condemned reliance on labor-based arguments in copyright.⁵⁵³ Yet the rhetoric of this brief excerpt seems the exception rather than the rule: fair use courts eschew examination of the criticism in favor of the credibility of the critic.

4. *Scholarship and Research*

What I categorize here as claims of fair use in support of scholarship and research cuts even more broadly than the section heading suggests; defendants have invoked the interests of teaching, education, and research in a wide variety of contexts. In almost every instance, however, they have succeeded only where the court agreed that their claimed categorization matched the court’s understanding of the genuineness of the individual defendant’s conduct in the context of the asserted pattern.

That distinction has been observed already in the context of the photocopying cases, *American Geophysical Union v. Texaco, Inc.*⁵⁵⁴ and *Princeton University Press v. Michigan Document Services*,⁵⁵⁵ in which courts rejected defendants’ attempts to characterize their use of the plaintiffs’ works as educational or research in orientation.⁵⁵⁶ A group of cases involving biographers’ attempts to use unpublished material authored by their subjects reveals a similar pattern. *Sundeman v. Seajay Society, Inc.* concluded that a biographer’s use of unpublished work produced by Margaret Rawlings constituted fair use, where the defendant “attempted to shed light on Rawlings’ development as a young author, review the quality of [Rawlings’] *Blood of My Blood*, and comment on the relationship between Rawlings and her mother.”⁵⁵⁷

The Second Circuit’s opinions in *New Era Publications International, ApS v. Carol Publishing Group*⁵⁵⁸ and *New Era Publications*

553. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359-60 (1991).

554. 60 F.3d 913 (S.D.N.Y. 1994).

555. 99 F.3d 1381 (E.D. Mich. 1996).

556. See *id.* at 1388-89; *Am. Geophysical Union*, 60 F.3d at 918-19.

557. 142 F.3d 194, 202 (4th Cir. 1998).

558. 904 F.2d 152, 161 (2d Cir. 1990) (finding fair use in a biographer’s use of the subject’s work).

*International, ApS v. Henry Holt & Co.*⁵⁵⁹ can be reconciled on their face by looking to the court's own descriptions of the defendants' activities. In the former case, "as the author explained in detail in an affidavit submitted below, discussing the reason why he included each quote, the author uses [the copyrighted] works for the entirely legitimate purpose of making his point that [the subject] Hubbard was a charlatan and the Church a dangerous cult."⁵⁶⁰ The defendant, in short, was practicing the true craft of biography and could substantiate that claim. In the latter case, according to the court, no such argument could be made: "The public would not necessarily be deprived of an 'interesting and valuable historical study,' but only of an infringing one."⁵⁶¹ That court's earlier opinion addressing a biographer's use of unpublished materials of J.D. Salinger can be measured by the same standard.⁵⁶² Rejecting the claim of fair use, the court noted, in an oft-criticized passage, that the defendant was not truly engaged in the practice of biography, at least as the court understood it:

The biographer who copies only facts incurs no risk of an injunction; he has not taken copyrighted material. And it is unlikely that the biographer will distort those facts by rendering them in words of his own choosing. On the other hand, the biographer who copies the letter writer's expression of facts properly faces an unpleasant choice. If he copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined; if he "distorts" the expressive content, he deserves to be criticized for "sacrificing accuracy and vividness." But the biographer has no inherent right to copy the "accuracy" or the "vividness" of the letter writer's expression. Indeed, "vividness of description"

559. 873 F.2d 576, 583-84 (2d Cir. 1989) (denying a biographer's claim of fair use, in dicta). The court ultimately ruled out an injunction on the ground of laches. *Id.* at 584.

560. *Carol Publ'g Group*, 904 F.2d at 156. To the same effect are *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736-37 (2d Cir. 1991) (ruling in favor of a biographer's claim of fair use on the ground that the defendant's work in fact consisted of a scholarly biography, and the defendant had not misused the plaintiff's copyrighted (but unpublished) journal entries and letters), and *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1077-78 (2d Cir. 1992) (characterizing one researcher's reuse of a predecessor's work as fair use because the defendant "builds upon [the predecessor's] work to further develop our store of knowledge in this area.>").

561. *Henry Holt & Co.*, 873 F.2d at 584 (quoting from the district court's opinion) (citation omitted).

562. See *Salinger v. Random House, Inc.*, 811 F.2d 90, 96-97 (2d Cir. 1987).

is precisely an attribute of the author's expression that he is entitled to protect.⁵⁶³

Other claims to scholarly research and/or educational use test some of the limits of this category, but results in these cases still can be viewed as acknowledging or rejecting individual claims to participation in this pattern. In *Greenberg v. National Geographic Society*, the court concluded that reproducing the plaintiff's photographs as part of a montage included in a CD-ROM reproduction of back issues of *National Geographic* magazine did not constitute an "educational" use of the photographs.⁵⁶⁴ In *Elvis Presley Enterprises, Inc. v. Passport Video*,⁵⁶⁵ the court affirmed an injunction against distributing a "biography" of Elvis Presley on the ground that the defendants' inclusion of photographs, film clips, and songs of Elvis was more consistent with commerce than scholarship. "Passport is not advertising a scholarly critique of historical analysis, but instead seeks to profit at least in part from the inherent entertainment value of Elvis' appearances on [various television programs]."⁵⁶⁶ Courts in *Weissmann v. Freeman*,⁵⁶⁷ *Educational Testing Service v. Katzman*,⁵⁶⁸ and *Marcus v. Rowley*⁵⁶⁹ each concluded that the defendants' activities were not truly "educational," in the sense that educators and/or their students did not, as a matter of participation in an educational enterprise, typically use copyrighted material as the defendants had done in each of these cases.⁵⁷⁰ The court in *Weissmann* captures both the facts of that case and the tone of the relevant pattern:

Dr. Freeman stood to gain recognition among his peers in the profession and authorship credit with his attempted use of Weissmann's article; he did so without paying the usual price

563. *Id.* at 96.

564. 244 F.3d 1267, 1275 (11th Cir. 2001).

565. 349 F.3d 622 (9th Cir. 2003).

566. *Id.* at 628.

567. 868 F.2d 1313, 1323-24 (2d Cir. 1989) (involving reproduction of a teaching colleague's course syllabus).

568. 793 F.2d 533, 543 (3d Cir. 1986) (involving the use of Scholastic Aptitude Test (SAT) questions in conducting an SAT preparation course).

569. 695 F.2d 1171, 1175-76 (9th Cir. 1983) (involving the uncredited reproduction of a cake decorating booklet in conducting a baking course).

570. See *Educ. Testing Serv.*, 793 F.2d at 543; *Marcus*, 695 F.2d at 1175-76.

that accompanies scientific research and writing, that is to say, by the sweat of his brow. Particularly in an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure.⁵⁷¹

5. *Reverse Engineering*

It should be apparent that the classification of appellate fair use cases decided since 1978 not only veers in and out of the categories suggested by the text of § 107, but also veers between broad and narrow classifications themselves. One could locate additional smaller categories, taking biography cases, for example, from the scholarship/research group. The analytic point made by the differences in scope is that the categories are prone to evolve as patterns themselves evolve. The parody classification offers some support for this argument. A better example is the group of cases that emerged from scholarship/research over the last ten years under the heading “reverse engineering.” It currently appears to be the case that a genuine, good faith claim of “reverse engineering” of a copyrighted computer program will justify a finding of fair use, regardless of the purpose of the reverse engineering or of the scope of the reproduction of the program that occurs during the “reverse engineering” process.⁵⁷²

Generally, “reverse engineering” is a label that lawyers and courts have attached to a variety of technical processes involved in disassembling a computer program in order to determine how it is constructed.⁵⁷³ In both technology and copyright terms, this often

571. *Weissmann*, 868 F.2d at 1324.

572. It is instructive to compare the doctrinal development of what amounts to a fair use privilege to reverse engineer copyrighted works for certain purposes, largely consistent with industry custom, with the rejection of much of that development for purposes of claims made under the Digital Millennium Copyright Act. Compare Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1582-94 (2002), with 17 U.S.C. § 1201(f) (2000) (granting reverse engineering exception to liability for circumvention of technological protection system protecting copyrighted works that applies solely in the context of interoperability research), and Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 560-64 (2003) (arguing that enforcing sharing rules such as privilege for reverse engineering may needlessly dampen incentives to innovate if rules are imposed too early in the development of a technology or industry).

573. See, e.g., Samuelson & Scotchmer, *supra* note 572, at 1577 & n.1. Samuelson and

requires making at least one reproduction of a copy of the program. The results of the reverse engineering process are useful for determining the uncopyrightable “ideas” on which the copyrighted “expression” of the program is built, which in turn may be useful for designing programs that work together with, or even substitute for, the original program.

The “reverse engineering” exception was conceived in the context of research and study. The seminal “reverse engineering” fair use case is *Sega Enterprises v. Accolade, Inc.*,⁵⁷⁴ litigation between competing manufacturers of video game systems and games, in which the Ninth Circuit held that reproduction and disassembly of a copyrighted computer program built into each copy of the plaintiff’s game cartridges did not infringe the plaintiff’s copyright: “Where there is good reason for studying or examining the unprotected aspects of a copyrighted computer program, disassembly for purposes of such study or examination constitutes a fair use.”⁵⁷⁵ In that case, the “good reason” consisted of the defendant’s legitimate interest in accessing unprotectable ideas embedded in the plaintiff’s computer program.⁵⁷⁶

Though the doctrine has been described as being limited to necessary access to “ideas,” and rooted in policy injunctions against copyright holders unfairly extending the competitive advantage granted by a software copyright, practical application of the “reverse engineering” exception has been guided not by these policy concerns but by an increasingly developed sensitivity to the actual practice of reverse engineering. In *Atari Games Corp. v. Nintendo of America, Inc.*⁵⁷⁷ and in *Sony Computer Entertainment, Inc. v. Connectix Corp.*,⁵⁷⁸ claims of “reverse engineering” as fair use were sustained⁵⁷⁹ via descriptions of the defendants’ processes that made abundantly

Scotchmer define reverse engineering in its broadest sense, as the “process of extracting know-how or knowledge from a human-made artifact,” a definition that is not inconsistent with my analysis of the computer program cases.

574. 977 F.2d 1510, 1522-23 (9th Cir. 1992).

575. *Id.* at 1520.

576. *Id.* at 1520-21.

577. 975 F.2d 832, 844 (Fed. Cir. 1992).

578. 203 F.3d 596, 603 (9th Cir. 2000).

579. In *Atari*, the fair use argument was accepted but its proponent lost the case on other grounds; Atari obtained the computer code that it reverse engineered by misleading the Copyright Office as to its intentions. See *Atari*, 975 F.2d at 841-42. Atari’s error “tainted” the code in which its reverse engineering argument was based.

clear that they had met burdens of demonstrating the practice of "legitimate" reverse engineering—even while the courts focused nominally on interests in distinguishing "idea" from "expression."⁵⁸⁰

Similarly, the two appellate cases that have rejected "reverse engineering" arguments in the context of fair use, *DSC Communications Corp. v. Pulse Communications, Inc.*⁵⁸¹ and *Triad Systems Corp. v. Southeastern Express Co.*,⁵⁸² did so because they concluded that the practices in question could not be described credibly as "reverse engineering."⁵⁸³ Notably, in both of these cases, as in *Sony v. Connectix*,

580. According to the court in *Atari*:

Atari chemically removed layers from Nintendo's chips to reveal the [copyrighted] 10NES object code. Through microscopic examination of the "peeled" chip, Atari engineers transcribed the 10NES object code into a handwritten list of ones and zeros. While these ones and zeros represent the configuration of machine readable software, the ones and zeros convey little, if any, information to the normal unaided observer. Atari then keyed this handwritten copy into a computer. The computer then "disassembled" the object code or otherwise aided the observer in understanding the program's method or functioning. This "reverse engineering" process, to the extent untainted by the 10NES copy purloined from the Copyright Office, qualified as a fair use.

Id. at 844. The court in *Connectix* was less descriptive but equally direct: "The question then becomes whether the methods by which Connectix reverse-engineered the [copyrighted] Sony BIOS [which included reproduction of the Sony program] were necessary to gain access to the unprotected functional elements within the program. We conclude that they were." *Connectix*, 203 F.3d at 603. *Cf. Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1539 n.18 (11th Cir. 1996) (characterizing *Sega* as "persuasive," in *dicta*).

581. 170 F.3d 1354 (Fed. Cir. 1999).

582. 64 F.3d 1330 (9th Cir. 1995).

583. *DSC Communications Corp.*, 170 F.3d at 1363; *Triad Sys. Corp.*, 64 F.3d at 1336. As the Federal Circuit was descriptive on this point in accepting a "reverse engineering" claim in *Atari*, it was equally descriptive in rejecting an equivalent claim in *DSC Communications*:

DSC's evidence showed that Pulsecom representatives made copies of the POTS-DI software on Pulsecom POTS cards as part of the ordinary operation of those cards, not as part of an effort to determine how the Litespan system worked. Rather than being part of an attempt at reverse engineering, the copying appears to have been done after Pulsecom had determined how the system functioned and merely to demonstrate the interchangeability of the Pulsecom POTS cards with those made and sold by DSC.

DSC Communications, 170 F.3d at 1363. For another example of this claim, see *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990), in which the defendant argued that his sale of unauthorized cable television signal de-scrambling chips involved fair use of the computer program controlling the scrambling/descrambling function on authorized chips, but did not characterize the defense in "reverse engineering" terms. *Id.* at 844. The defendant's program decoding/recoding practice was consistent with such an argument, and the court's rejection of the defense (on the ground that the defendant was a pirate) was consistent with the rulings in *DSC Communications* and *Triad Systems*.

for example, the original argument in favor of “research and study” of computer programs evolved quickly into a claim in favor of the practice of “reverse engineering.”

6. Legal and Political Argument

A trio of cases suggests that use of copyrighted works either in the context of rules regulating litigation and trial, or in political argument, will be considered fair. In *Bond v. Blum*, the plaintiff's work was reproduced and disclosed as a piece of evidence in the context of pending litigation; the use was ruled fair.⁵⁸⁴ In *Religious Technology Center v. Wollersheim*, the plaintiff's work was reproduced and disclosed to an expert witness in the course of pretrial activities; again, the court ruled the use fair.⁵⁸⁵ And in *National Rifle Association of America v. Handgun Control Federation of Ohio*, an antihandgun advocacy group copied a list of local legislators originally prepared and distributed by the prohandgun plaintiff, and then redistributed the list with a request urging recipients to contact the legislators and oppose NRA proposals.⁵⁸⁶ The court colored its ruling with the rhetoric of the First Amendment in a way that suggests that the manner of the defendant's use was consistent with time-honored traditions of political debate: “The document was used primarily in exercising HCF's First Amendment speech rights to comment on public issues and to petition the government regarding legislation.”⁵⁸⁷

7. Storytelling

“Reverse engineering” cases suggest the emergence of a newly-recognized pattern. Storytelling cases suggest the disappearance of a previously recognized pattern. In *Narell v. Freeman*, the court noted that a defendant novelist who had borrowed material from a plaintiff historian likely had engaged in fair use: “Part of the fasci-

584. 317 F.3d 385 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 103 (2003).

585. 971 F.2d 364 (9th Cir. 1992).

586. 15 F.3d 559, 560 (6th Cir. 1994). The case represents perhaps another illustration of the “goose and gander” maxim, suggested above in connection with *Hustler*. See *supra* notes 547-48 and accompanying text.

587. *Nat'l Rifle Ass'n*, 15 F.3d at 562.

nation fiction holds for writers and readers is its ability to interweave real and invented details. [The defendant] Freeman used [the plaintiff] Narell's work to provide context for her novel, just as storytellers throughout time have used history as source material for works of imagination."⁵⁸⁸ In the very different context of computer games, but using similar reasoning, a later panel of the same court concluded in *Galoob Toys, Inc. v. Nintendo of America, Inc.* that individual game players were entitled as a matter of fair use to modify the game displays of games that they had lawfully purchased.⁵⁸⁹

Distinguishing *Galoob*, however, the Ninth Circuit more recently decided that any new "stories" to be told concerning the plot and characters of video games could be told only with the permission of the copyright owner. In *Micro Star v. Formgen, Inc.*, the court concluded that the defendant's distribution of supplemental computer files that functioned in tandem with the plaintiff's computer games constituted unauthorized distribution of derivative works—stories based on plaintiff's copyrighted characters.⁵⁹⁰

One might reconcile this small group of cases on the ground that *Narell* is badly reasoned. Before reaching its fair use discussion, the court concluded that there was no infringing similarity between the works of the plaintiff and the defendant. Moreover, as history, the plaintiff's work would be entitled conventionally only to the thinnest of copyrights to begin with, as a factual work. Alternatively, the court might be distinguishing between creating of a new story (*Narell*) and copying of what amounts to the same story (*Micro Star*). But the trend seems to extend beyond such conventional distinctions; at least in the Ninth Circuit, the court seems to be sending the message that narrative construction is a function of authors and publishers rather than readers. What may once have been a social or cultural "storytelling" pattern is now apparently regarded as a collection of practices by idiosyncratic authors. The *Micro Star*

588. 872 F.2d 907, 915 (9th Cir. 1989) (citation omitted).

589. 964 F.2d 965 (9th Cir. 1992). As in *Sony Corp.*, Galoob was accused by Nintendo of contributory infringement. *Id.* at 967. Galoob sold the "Game Genie," a device that could be attached to Nintendo's video game console that caused video displays generated by the console to change. *Id.*

590. 154 F.3d 1107, 1113 (9th Cir. 1998). The court noted that these new stories were "anything but" transformative without beginning to explain what it meant by that conclusion. *Id.* at 1113 n.6.

court is in line with the Supreme Court's opinion in *Stewart v. Abend*, which concluded that the producers of the film *Rear Window* were not entitled, as a matter of fair use, to distribute their film without the permission of the holders of the renewal term of the copyright in the short story on which the movie was originally based.⁵⁹¹

8. Comparative Advertising, Information Merchants, and the Ordinary (Personal) Use

The final group of cases highlight both the strength and the chief drawback of the pattern-oriented approach. Its strength, as I have emphasized above, lies in its relative predictability. Once the defendant's activity is placed properly in the context of some relevant pattern, the outcome of the fair use inquiry can be resolved with little additional difficulty. The drawback is that the set of relevant patterns seem to be relatively limited, may be resistant to change, and apparently are not supported by a normative structure justifying the particular set identified in the cases, or identified anywhere else.⁵⁹² There is always a risk that the court will get the classification wrong. Indeed, I should confirm again at this point that while my efforts in this section to reconcile the last twenty-five years of appellate fair use decision making may seem strained to some readers and at least some points, I do not endorse the results reached in each of these cases. Some of them were decided under now-outmoded authority. Others betray an unnecessarily crabbed view of the patterns on which they purport to rely. It must be remembered, then, that the pattern-oriented approach is an analytic technique that depends, as any fair use analysis must, on the records built by the parties as well as on the strength and persistence of the patterns invoked by the parties and courts.

591. 495 U.S. 207 (1990). The case might be out of step with the more recent opinion in the *Wind Done Gone* litigation, *SunTrust Bank v. Houghton Mifflin Co.* See *supra* notes 269-71 and accompanying text. But the court in the latter case intimated that had the author not engaged in a parodic retelling of *Gone With the Wind*, but instead had merely told or extended the original novel from the perspective of one its original characters, her claim of fair use would have been far weaker. See *SunTrust Bank*, 268 F.3d at 1279 & n.3.

592. I take up this question in more depth in the next Part, where I suggest that in the context of copyright policy broadly understood, reliance on processes embedded in social or cultural patterns are in fact a proper route to promoting creative expression.

That concern may be evident nowhere more than with this group of cases, in which a sizeable number of fair use cases have been decided both in favor of and against what appears to be simple reproduction and redistribution of the plaintiff's works. On closer inspection, as above, it appears that the group can be broken down. On the one side lie cases in which the defendant is characterized by the court as acting as a merchant in precisely the kinds of goods (or works) offered by the plaintiff. This kind of "use" is unfair. These include *Infinity Broadcast Corp. v. Kirkwood*,⁵⁹³ in which the defendant offered access to radio broadcasts via telephone "listen lines;" *Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors*,⁵⁹⁴ in which the defendant reproduced the plaintiff's real estate listings in a supermarket brochure; *Financial Information, Inc. v. Moody's Investors Service, Inc.*,⁵⁹⁵ involving the reproduction of the plaintiff's financial market data; *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*,⁵⁹⁶ in which the defendant produced and sold online access to "clip previews" of the plaintiff's motion pictures; and *United States v. Slater*,⁵⁹⁷ in which the court confirmed that a criminal copyright defendant convicted of software piracy was not entitled to a jury instruction on the fair use doctrine.⁵⁹⁸

The premise that the defendant's use is unfair because the defendant was acting not as a participant in some recognized or defined social or cultural pattern, but instead as a mere market actor, either selling without permission or buying without paying, extends further. It led to the rejection of fair use arguments in *United Telephone Co. of Missouri v. Johnson Publishing Co., Inc.*,⁵⁹⁹ involving the unauthorized reproduction (pre-*Feist*) of telephone directory listings; *Micro Star v. Formgen*,⁶⁰⁰ the case of the unauthorized video game "sequels;" *Davis v. The Gap, Inc.*,⁶⁰¹ in which the defen-

593. 150 F.3d 104 (2d Cir. 1998).

594. 786 F.2d 1400 (9th Cir. 1986).

595. 751 F.2d 501 (2d Cir. 1984).

596. 342 F.3d 191 (3d Cir. 2003).

597. 348 F.3d 666 (7th Cir. 2003).

598. The *Slater* opinion is particularly clear in its characterization of the defendants' piracy ring as consisting of a large-scale business dealing in unauthorized copies of copyrighted computer programs. See *id.* at 669.

599. 855 F.2d 604 (8th Cir. 1988).

600. 154 F.3d 1107 (9th Cir. 1998).

601. 246 F.3d 152 (2d Cir. 2001).

dant used the plaintiff's copyrighted sunglass design in an advertisement; *Ringgold v. Black Entertainment Television, Inc.*,⁶⁰² where the defendant decorated the set of a television program with a poster depicting the plaintiff's copyrighted quilt; and two recent cases involving unauthorized distribution of copies of copyrighted religious materials or prayer books.⁶⁰³ The premise that the defendant was simply a market participant, as either consumer or merchant, and not a member of some distinct cultural pattern, also dictated findings of no fair use in the two appellate cases to date to deal with peer-to-peer file sharing services on the Internet, *A & M Records, Inc. v. Napster, Inc.*,⁶⁰⁴ and *In re Aimster Copyright Litigation*.⁶⁰⁵ I return to the problem of new uses and new technologies in the next Part, but here it should be noted that courts treated fair use questions in both cases as relatively straightforward, because in both it appeared to courts that the defendants were simple merchants and the users of their technologies were simple consumers.

Yet there is a parallel class of "information merchants" that have succeeded on fair use claims where these "ordinary merchants" have failed, and it appears that the most sensible way to distinguish the two groups is according to the courts' characterizations of the patterns into which the defendants' practices fall. One cluster of these latter cases involves comparative advertising. It appears that so long as the plaintiff's work is used by the defendant to advertise some other product or service offered by the defendant, that use should be fair so long as it can be described credibly as "comparative advertising." Such a characterization carried the day for defendants in *Sony Computer Entertainment America, Inc. v. Bleem, LLC*,⁶⁰⁶ in which the defendant advertised its computer product using a screen shot taken from the plaintiff's program, *Consumers Union v. General Signal Corp.*, involving reuse of a *Consumer Reports* product

602. 126 F.3d 70 (2d Cir. 1997).

603. *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 98-99 (2d Cir. 2002) (noting that defendants copied plaintiffs' prayer book and used it exactly as the plaintiffs would have); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1112 (9th Cir. 2000) (stating that defendants copied and distributed religious text to church members).

604. 239 F.3d 1004 (9th Cir. 2001).

605. 334 F.3d 643 (7th Cir. 2003).

606. 214 F.3d 1022, 1024 (9th Cir. 2000).

review,⁶⁰⁷ and *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*,⁶⁰⁸ in which the defendant advertised its television programming guide by including a photograph of the cover of plaintiff's competing publication. In each of these cases, "advertising" was deemed to be noninjurious to the health of a copyright. One might say that these courts concluded that the defendants were not acting in the market for the plaintiff's product but were one level removed, part of a pattern of offering information about that market to consumers considering whether and how to enter it.

If that distinction sounds incredible (these meta-information providers easily could be classed as profiting from derivative works, and the cost of permissions built into advertising expenses generally), consider that it seems to extend more broadly, to support fair use decisions favoring other distributors of "information about information." So long as the defendant is engaged in compiling and distributing information *about* other parties' copyrighted works—a function related to, but conceptually distinct from, criticism or evaluation—it appears to be part of a protected pattern. This explains the results in *Ty, Inc. v. Publications International Ltd.* (the Beanie Baby case, in which Judge Posner explicitly compared the creators of the collectors' guide to critics or evaluators),⁶⁰⁹ and *Kelly v. Arriba Soft, Inc.*, concluding that an Internet search engine offering results consisting of thumbnail reproductions of the plaintiff's photographs would be engaged in fair use, but offering full-size copies would not be.⁶¹⁰

That leaves the paradox of the "ordinary use," or what some courts (in the cases cited above) characterize as the "intrinsic function" of the copyrighted work. In the main, invoking the "intrinsic function" standard means that a court is disinclined to find a given use fair, since the defendant is using the work in the same way that the plaintiff intended that it be used, and for which the plaintiff likely expected to be compensated.⁶¹¹ The paradox is what the law

607. 724 F.2d 1044, 1046 (2d Cir. 1983).

608. 626 F.2d 1171, 1172 (5th Cir. 1980).

609. 292 F.3d 512, 517-20 (7th Cir. 2002).

610. 336 F.3d 811, 822 (9th Cir. 2003).

611. See *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 98-99 (2d Cir. 2002); *Davis v. The Gap, Inc.*, 246 F.3d 152, 174-76 (2d Cir. 2001); *Marcus v. Rowley*, 695 F.2d 1171, 1173 (9th Cir. 1983); *supra* note 295 (describing Nimmer's "functional" test for the fourth fair use factor).

should make of an “ordinary” use that is simultaneously and plausibly characterized as a fair “personal” or “private” use. Recall that in *Diamond Multimedia Systems*, the Ninth Circuit intimated strongly that it regarded digital reproduction of recorded music onto portable MP3 players to be noncommercial, private, personal use, deserving of protection as fair use.⁶¹² Yet it could also be said that this is precisely the kind of “ordinary” use for which compensation (and permission) is expected.

In *Ringgold v. Black Entertainment Television*, the court argued that the defendant’s unauthorized use of a poster depicting the plaintiff’s quilt to decorate the set of a television production was comparable to a homeowner’s use of a poster to decorate a home, concluding (reasonably, under the facts of the case) that compensation was owed in both cases.⁶¹³ The positions in *Diamond Multimedia Systems* and in *Ringgold* seem to be conceptually incompatible. One possible resolution is to accept the relevance of a type of time- or space-“shifting” argument that the Supreme Court acknowledged in *Sony* and that the court in *Diamond Multimedia Systems* seemed willing to entertain. A second resolution is to accept the correctness of *Ringgold* and the error of the court in *Diamond Multimedia Systems*; the “ordinary use” approach seems to take both cases out of the realm of relevant social or cultural patterns.

C. Fair Use Problems and Solutions

In this section I discuss some of the more picturesque flaws in the fair use doctrine and suggest that the pattern-oriented approach addresses those flaws more successfully than competing schemes. The first of these is a strategic or tactical dimension that is often underappreciated in fair use analyses: the problem of ex ante decision making. The remaining four are conceptual questions floating atop contemporary fair use jurisprudence: the role of markets, the question of “transformative” use, the “commercial/ noncommercial” distinction, and dealing with emergent practices, including file sharing and what some refer to as “transformative critical appropriation.” This final topic raises a particularly acute question: To

612. *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

613. 126 F.3d 70, 79-80.

what extent can the pattern-oriented approach accommodate social and cultural evolution?

1. Improving Fair Use Decision Making: The Ex Ante Problem

Perhaps the most serious flaw in the fair use doctrine is that it functions almost entirely as a creature of judges. Fair use is an *ex post* determination, a lottery argument offered by accused infringers forced to gamble, after the fact, that they did not need permission before. Lawyers bemoan the unpredictability that reliance on the four fair use factors brings. As many have noted, two of the three Supreme Court decisions on fair use were reached on closely divided votes.⁶¹⁴ All three involved reversals at the intermediate appellate level and again at the Supreme Court level.⁶¹⁵

This cannot be the way anyone intends the copyright system to function. The rest of copyright law, as practitioners and scholars both know, is largely a matter of planning. A would-be "fair user" who asks counsel for advice on whether to seek permission or to seek refuge under § 107 inevitably is counseled to seek permission. Over time, this has the inevitable effect of training both producers and consumers of copyrighted works, and counsel, judges, and even members of Congress, that permission is not only a norm but a compelling norm. Fair use becomes not merely the exception but an extraordinary exception, to be dispensed only rarely and even then only by the grace of unpredictable authority.

If, by contrast, the fair use doctrine is to mean something substantial, and if Congress and the Supreme Court are to be held to their word regarding the benefits of research, scholarship, criticism, journalism, and the like, there must be a means for those planning to use copyrighted works in those ways to have some confidence that

614. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571 (1994) (deciding nine to zero); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 541 (1985) (splitting six to three); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 418 (1984) (splitting five to four).

615. *Acuff-Rose Music v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 501 F. Supp. 848 (S.D.N.Y. 1980), *aff'd in part and rev'd in part*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985); *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429 (C.D. Cal. 1979), *aff'd in part and rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

they will not be challenged unexpectedly by copyright owners.⁶¹⁶ The pattern-oriented approach offers not a perfect solution to that dilemma, but a solution that is superior to one that calls only for balancing the respective benefits of authorized and unauthorized use, or to a solution that looks primarily, if not exclusively, to the availability of purchased permission. Appeals to “fairness” or to some cabined form of “the good life” are, like appeals to market failure, difficult enough for scholars and judges to manage. Practitioners have little patience for such abstractions. The pattern-oriented approach, however, gives system participants at both front and back ends a framework for the fair use inquiry that, while never as certain as obtaining express permission, offers a prospective “fair user” the possibility of far better than even odds. If that person can “talk the talk” (describe the practice in terms that connect to a defined cultural or social pattern) and also “walk the walk” (demonstrate that his or her conduct and practice are consistent with the roles and practices of that pattern), the odds of successfully asserting a fair use claim should increase significantly.

2. Fair Use and Markets for Copyrighted Works

The fourth statutory fair use factor commands courts to consider the effect of the defendant’s use on the market for and the value of the plaintiff’s work. The Court in *Sony* added the now-accepted gloss that this factor should take account not only of the defendant’s activities but of the possibility that many more would follow in the defendant’s footsteps.⁶¹⁷ If the defendant’s practice were universalized, what would the character of the plaintiff’s injury be? In *Harper & Row*, the Court offered the suggestion that a use was unlikely to be fair if the defendant was attempting to avoid payment of a “customary” fee,⁶¹⁸ and in *Campbell* the Court noted that while the fourth factor was undoubtedly first among equals in the fair use

616. This proposition is based on considerations of efficiency. See Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601 (2001) (describing the role of ex ante entitlements in designing optimal property rights scheme, and fairness); see also JESSICA LITMAN, DIGITAL COPYRIGHT 178-80 (2001) (arguing that copyright rules need to be easy to understand, if we expect individuals to obey them).

617. *Sony Corp.*, 464 U.S. at 451.

618. *Harper & Row*, 471 U.S. at 562.

calculus, some market effects simply did not count.⁶¹⁹ On the whole, the Court has been unhelpful in explaining the meaning of the market in the context of fair use.

Suppose a copyright holder develops the interest and the ability not only to distribute reproductions of a copyrighted work in its entirety, but to collect a royalty for any conceivable reproduction, distribution, display, performance, or derivative of both the entire work and any lesser-included portion of the work. Does that ability to collect royalties define "the market" for the work, so that any use of the work without paying the royalty constitutes "market injury" that disfavors fair use? The *American Geophysical Union* and *Princeton University Press* courts come close to that conclusion;⁶²⁰ in their judgment, avoidance of such a market renders a fair use claim unlikely to succeed if the market is "traditional, reasonable, or likely to be developed"⁶²¹—which is a stone's throw from concluding, as the Ninth Circuit did in *A & M Records v. Napster*, that the copyright holder possesses both the power to enforce an existing market for a copyrighted work and the power to determine whether a market should emerge.⁶²² Under this approach, markets may be defined *ex ante* by the author's incentive structure, or *ex post* by the author's ability to collect revenue. Markets—and fair use—are what authors say they are.

How then should meaning be given to the idea of markets for copyrighted works, without permitting the concept of markets to swallow whole the notion of uncompensated use? The answer here should be akin to the answer provided above with respect to the definition of a social or cultural pattern relevant to consumption and use of the work. One should take the *American Geophysical Union* court at its word, but scrutinize the phrase "reasonable, customary, or likely to be developed."⁶²³ The fact that the plaintiff intends to charge for certain uses, which might make a market "likely to be

619. *Campbell*, 510 U.S. at 591.

620. See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385-88 (6th Cir. 1996); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926-31 (2d Cir. 1994).

621. *Princeton Univ. Press*, 99 F.3d at 1387; *Am. Geophysical Union*, 60 F.3d at 930.

622. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001); see also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111 (2d Cir. 1998); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 80-81 (2d Cir. 1997); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

623. See *supra* note 621 and accompanying text.

developed," does not automatically make a permission structure also "reasonable," let alone "customary." One needs to ask whether it is "reasonable" or "customary" or "likely" against a relevant set of expectations. And those expectations should include not only the expectations of the copyright holder; they also should include provable social and cultural patterns, if any, that surround use of the plaintiff's works according to the description provided in Part IV.A.1. The notion of an independent "market" that is out there, waiting to be found, is somewhat unsettling both economically and philosophically. Yet just as (for fair use purposes) social patterns are finally determined by courts, so too is the market.⁶²⁴ The distinction between the (modern) market economy and the (premodern) "embedded" economy, as drawn by Karl Polanyi, both illustrates and integrates how a court should distinguish between transactions requiring compensation and those that do not.⁶²⁵ Within a social or cultural pattern, information transactions are arranged according to the conventions and structures of the pattern, rather than according to those of the market economy.

624. The copyright owner might be able to recapture some revenues potentially associated with "fair users" from paying customers, a theme emphasized in the patent context recently by Judge Posner. See *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1017 (7th Cir. 2002). The (shared) expectations of both creative and consumptive communities may fairly be said never to have anticipated those revenues in the first place when evaluating incentives to create.

625. See POLANYI, *supra* note 449, at 57 ("Instead of economy being embedded in social relations [the older model], social relations are embedded in the economic system."). "Embedded" markets in Polanyi's account are "markets" that are organized not merely by modern notions of price, but by socio-political structures, or (roughly) what I refer to as patterns. See KARL POLANYI, *THE LIVELIHOOD OF MAN* 47-56 (Harry W. Pearson ed., 1977). The sense of "market" as that term is used in § 107 is the modern sense of market organized by price. In theory, the distinction, based on custom, norm, and practice, preserves the best of both worlds: the autonomy, civility, and welfare-enhancing effects of the market economy, see Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 351-55 (1996); Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 766-71, 775-76 (1986), and the social and cultural importance of a socially-constructed "commons" that stands apart from that market. See Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 89. Cf. Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19, 20-24 (Mary C. Brinton & Victor Nee eds., 1998) (describing institutional model of social networks to complement institutional economic models).

3. Defining "Transformative" Uses

The *Campbell* decision gave the law the "transformative use" standard as a measure of the first fair use factor.⁶²⁶ Making "transformation" the touchstone of the first factor has led to a raft of fair use cases in which any and every would-be fair use claimant argues that "transformation" is involved. As a beacon of fair use, the transformative use standard has become all things to all people. In *Campbell*, Roy Orbison's pop standard "Oh, Pretty Woman" was "transformed" into 2 Live Crew's rap "parody."⁶²⁷ The court in *Núñez* agreed that reproducing the plaintiff's photograph in the newspaper "transformed" the photograph into news.⁶²⁸ In *Sony v. Bleem*, the defendant "transformed" the plaintiff's audiovisual work (a screen shot of the plaintiff's video game) into comparative advertising.⁶²⁹ In *Sony v. Connectix*, the defendant successfully argued that building a rival video game platform using a derivative of the plaintiff's copyrighted computer program "transformed" that program.⁶³⁰ In *A & M Records v. Napster*, Napster argued unsuccessfully that users of its MusicShare technology were "transforming" the plaintiffs' musical works by digitizing them and sharing them around the world.⁶³¹

As the market must have legal boundaries, so must "transformation" (at least so long as *Campbell* remains the law). When connected to the notion of social and cultural patterns, "transformation" is something that happens to a work, or more to the point, to a type of work, when it is processed in the context of a certain social practice, by participants in that practice. The idea of "degrees" of transformation, implicit in the Court's note in *Campbell* that a defendant who produces a work that is "more" transformative earns greater notice under fair use,⁶³² makes sense if one focuses not on the work itself but on the manner in which the defendant practices. Social

626. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). That standard was offered originally by Judge Leval as a unifying theme for all of fair use, to measure the kind of creativity that fair use would do a better job of promoting than centralizing copyright control in the author. Leval, *supra* note 174, at 1111.

627. *Campbell*, 510 U.S. at 572.

628. *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

629. *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, (9th Cir. 2000).

630. *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 606-07 (9th Cir. 2000).

631. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

632. *Campbell*, 510 U.S. at 582 n.16.

patterns, as I have suggested they be defined, may be inherently transformative, that is, inherently creative. I elaborate on the social science support for that proposition in the next Part. Here, I note that the notion of transformative use can be successfully cabined by referring to the patterns idea.

4. Distinguishing Between "Commercial" and "Noncommercial" Uses

The same is true with respect to the distinction between "commercial" and "noncommercial" uses. The distinction derives from the decision in *Sony*, which noted that the plaintiff bore the burden of proving market injury from the VTR users' (noncommercial) time-shifting.⁶³³ From that case and its successor, *Harper & Row*, we get the notion that "commercial" use is "presumptively" unfair.⁶³⁴ Although the Court tried in *Campbell* to undo the damage by insisting that a finding of "commercial" use under the first factor ought to be weighed in the fair use calculus along with all other considerations,⁶³⁵ courts still cite frequently to the commercial use "presumption" in deciding not to sustain a fair use claim. At the least, some courts and scholars use the "commercial/noncommercial" dividing line to allocate the burden of proof with respect to market injury.

Unless "commercial" means "income-producing," however, the term as deployed by the Supreme Court means nothing at all,⁶³⁶ and if it means "income-producing," then virtually no use of copyrighted material is "noncommercial." Music consumers using Napster's technology were engaged in "commercial" use because they were saving money that otherwise would be spent buying recorded music. By this standard, even time-shifting with a VTR should count as "commercial," given consumer "income" measured by the costs of

633. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).

634. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (quoting *Sony Corp.*, 464 U.S. at 451).

635. *Campbell*, 510 U.S. at 583-84.

636. The time-shifters in *Sony* received nothing from their retention of copies of the plaintiffs' programs. The infringing journalists in *Harper & Row* were engaged in "commercial" use since they were selling copies of their magazine. The noninfringing musicians in *Campbell* were engaged in "commercial" use since they hoped to profit from sales of their record album.

pre-recorded tapes that go unpurchased. As some courts have observed, even the practices described in the preamble to § 107 are routinely engaged in for money, but that should make them no more “commercial” than genuine (if rare) altruism.

As with markets and “transformation,” and for the same reasons, evidence of social and cultural patterns can and should provide a useful dividing line for what makes use of a copyrighted work unfairly “commercial.” As for the facts of the case, *Sony*, in which the noncommercial/commercial paradigm was introduced formally, it may be stretching the notion of patterns to conclude that “time-shifting” amounts to a social or cultural pattern that ought to be exempted from the copyright market. Set against the Court’s reliance on the “staple item of commerce” doctrine from patent law, however, it becomes clearer that the commercial/noncommercial line is in fact based on a sensible pattern—that of VTR consumers dealing at arms’ length with a commercial vendor, Sony. (This is not a social or cultural pattern in the fair use sense, but the market itself.) For doctrinal reasons,⁶³⁷ time-shifting consumers must be deemed to be non-infringing, but the opinion otherwise tells us relatively little about fair use. Generalizing beyond *Sony*, one should conclude that “noncommercial” use consists of a pattern in which consumption or use of the work is structured on nonmarket grounds, that is, according to the norms and conventions of an “embedded” rather than price-based economy, as noted above.⁶³⁸ Although this standard is considerably less than perfect even in describing the decided cases, it has the virtue of depending on evidence other than whether or not the defendants received, or avoided having to spend, cash.

5. Evaluating Emerging Practices of Personal Use, File Sharing, and Critical Appropriation

That leaves the problem with which this Article began, that is, how to evaluate claims that “file sharing” constitutes fair use. I situate this in the somewhat broader context of the individual “personal” user, the individual appropriator, new and emerging uses, and uses of new and evolving technologies, all of which (as *Napster*,

637. See *supra* notes 181-83 and accompanying text (describing procedural context of *Sony*).

638. See *supra* notes 449, 625 and accompanying text.

Sony, and *Campbell*, among other cases, suggest) have reached difficult accommodations under fair use. These problems will continue to be thorny, not only in the direct infringement versus fair use context that this Article has addressed directly, but in the secondary liability context that was raised in *Sony* and again in *Napster* and that is likely to arise frequently in the future, given the pace of technological evolution. In one way or another, these situations magnify concern over the relationship between an individual "use" that might be minor in effect but that causes a copyright owner significant concern when expanded dramatically (hypothetically or actually) to exponential levels.

Of particular concern in this area is whether the patterns-approach retains the ability to process evolving social and cultural practices given its clear affinity for recognition of fair use at a measured pace, rather than in response to dramatic change.⁶³⁹

Taking the "fairness" of file sharing and file sharing technology as an example of an arguably "fair" social or cultural pattern, the pattern-oriented approach suggests that the question of fairness cannot be answered in such abstract terms or with respect to P2P technology as a whole. It is difficult and probably impossible to contest the abstract notion that sharing is "good" and in some sense constitutes the kind of social pattern that should be insulated from market-related claims of copyright owners.⁶⁴⁰ But one needs to know

639. It should be clear that my conclusion differs from models that reserve special fair use protection for "radical improvers." See, e.g., Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1068-72 (1997) (arguing that the more transformative the individual use, the less likely the private market will support it). A pattern-oriented approach may at times be less generous to a "radical improver" (though one ought not necessarily to conclude that such an interest cannot otherwise be recognized in copyright law), but more generous in fields involving what appears to be "ordinary" improvement.

640. Why sharing is good is not a mystery. At an individual level, when we share, we may feel better about ourselves (perhaps because others think better of us, or because we have behaved altruistically, or because we have contributed to some collective good, or because we expect others to behave likewise in return). We may have increased society's store of wealth, or have effected a fairer redistribution of existing wealth. See Lunney, *supra* note 5, at 859-61. With respect to collective benefits and to creative and inventive activity in particular, not only do patterns of sharing derive from a powerful intuition, but their benefits have been observed empirically. See Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1055-59 (1989) [hereinafter Eisenberg, *Exclusive Rights*]; Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177, 181-84 (1987); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77 (1999);

who and what is being shared, and whether what is happening genuinely can be considered "sharing."

I do not agree, therefore, that there is any single, correct definition of "sharing" and that the legitimacy of "file sharing" can be measured absolutely against that standard. Use of a P2P computer network may or may not be part of a social pattern as described above.⁶⁴¹ The computer science literature offers a starting point for locating evidence of relevant patterns of which P2P systems may be a part.⁶⁴² Whether or not we refer to that pattern as a species of "sharing" may be relevant to the fair use question, but should not

cf. LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* (1983) (describing, from the artist's perspective, the role of the free flow of artistic production in a market-oriented society); Robert K. Merton, *The Normative Structure of Science*, reprinted in *THE SOCIOLOGY OF SCIENCE: THEORETICAL EMPIRICAL INVESTIGATIONS* 267, 273-75 (Norman W. Storer ed., 1973).

On the ground that sharing of scholarly work is a known good, disputes over copyright ownership within the academy generally have been resolved in favor of individual scholars and against their institutional employers, as matters of custom, tradition, and practice—i.e., patterns—notwithstanding the absence of an "academic" exception from copyright's work made for hire doctrine. See *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416-17 (7th Cir. 1988) (dictum); *Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1093-96 (7th Cir. 1987); Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1200-04 (2000).

641. There is some evidence, for example, that at least some network contexts lack the joint expectations of reciprocity that characterize most social or cultural patterns. Cf. Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 532 (2003) (arguing that behavior of uploading file sharers is based on faulty perceptions of reciprocity by other participants in file sharing networks); Eytan Adar & Bernardo A. Huberman, *Free Riding on Gnutella*, 5 FIRST MONDAY, Issue 10 (Oct. 2, 2000), at http://www.firstmonday.dk/issues/issue5_10/adar/index.html. I argue that how we understand the practice, and not the label, should play an important role in understanding how the law should regulate music "sharing" and file "sharing" on the Internet. The practice of sharing should be considered, to the extent possible, not as a matter of dictionary definitions, but as a matter of experience.

642. There is a rich field of research focused on developing software applications around social practices, known as Computer Supported Collaborative Work (CSCW). For examples of suggestions that certain uses of file sharing systems may be part of an embedded social practice, see Barry Brown et al., *Music Sharing as a Computer Supported Collaborative Application*, in *ECSCW 2001: PROCEEDINGS OF THE SEVENTH EUROPEAN CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK*, 16-20 SEPTEMBER 2001, BONN, GERMANY 179-98 (Wolfgang Prinz et al. eds., 2001); cf. Philip E. Agre, *P2P and the Promise of Internet Equality*, COMM. ACM Feb. 2003, at 39 (noting the impossibility of validating "distributed computing" as such without knowing the activities that the technology supports). For a discussion of the idea that computer networks can support social networks, see Barry Wellman, *An Electronic Group Is Virtually a Social Network*, in *CULTURE OF THE INTERNET* 179-205 (Sara Kiesler ed., 1997).

be determinative.⁶⁴³ In both *A & M Records v. Napster* and *In re Aimster*, courts found an utter absence of evidence of social or cultural patterns on which file sharers might have relied. In that sense, on the fair use question, both courts likely reached the right result.

Similarly, critical "appropriation," the sort of provocative recasting of existing works for critical purposes practiced by "audiocollage" artists such as Negativland and John Oswald and Plunderphonics and a host of others working both in sound and in other media, asserts compelling claims to fair use at the level of the individual artist. To be sustained under a pattern-oriented approach, artists and critics working in this or future genres must work both forward and backward, in argumentative terms.⁶⁴⁴ As participants in an

643. "File sharing," if it is a pattern, is only one of a large number of "sharing" phenomena or patterns recognized by our culture. There is the "kindergarten" sharing to which this Article referred above, so obviously noble that sharing is part and parcel of what we should teach our children. See *supra* note 1 and accompanying text. But see Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM.-VLA J.L. & ARTS 61, 63 (2002) (taking the view that sharing is the playground equivalent of spinach, that is, since sharing necessarily involves "giving something up," children hate to do it). When critiquing a pattern, however, where you stand may depend on where you sit. If the rule is sole ownership, then it should not be surprising to observe that children find sharing distasteful. If the community presumes that sharing is the rule, then one might well observe the opposite. In any case, my own children, for what it's worth, love vegetables. Even spinach. Always have. On the tricky problem of endogenous preferences, see *supra* note 18 and accompanying text.

Elsewhere, sometimes in law and sometimes not, we find a plethora of recognized sharing patterns, involving intangibles as well as tangibles: shared attitudes, shared resources, shared meaning, shared language, shared culture, shared experience, shared responsibility, shared obligation, shared strength. There is one's "fair share," market share, profit share, shares of stock, and cropshare. "Time shares" are bought and sold in the real estate market and time sharing was once an innovative way to accommodate multiple computer users in a limited resource environment. "Shareware" describes a type of computer program that is distributed for free, with the express reservation that users ought to remit some payment if they continue to use the program. "Mindshare" has gained currency in the business community as shorthand for a relevant market's perception that a given product or service is "important."

644. There is an essential tension, which may not be entirely resolvable, between the backward-looking nature of a legal system that both creates and relies on stable meanings, see Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940-42 (1999), and the forward-looking nature of a system that takes as one of its guiding principles the provision of incentives for new and diverse forms of cultural expression. That tension seems fundamental to copyright law, and as such is (happily) beyond the scope of this Article. Cf. Paul Edward Geller, *Copyright History and the Future: What's Culture Got to Do With It?*, 47 J. COPYRIGHT SOC'Y OF THE U.S.A. 209, 210 (2000) ("We become Janus-faced at the turn of every century and, more so, at the turn of each millennium. Facing both backward and forward, we are tempted to interpret history to anticipate or to influence the future.").

emergent practice, they work to stake out new roles and practices for members of that practice—even if, or especially if, that means transcending or redefining conventional constructs of “art” or “creativity”—and to define their output with reference to those roles and practices.⁶⁴⁵ To assure the legitimacy of the practice in copyright terms, and particularly as a matter of fair use, the pattern they establish should be grounded initially in an existing pattern and gradually “spun off” and recognized independently. This process need not and indeed often will not depend on the rhetorical demands of the law; it may well happen organically and/or with an occasional legal nudge. Patterns and practices evolve and stabilize over time (or do not), and from time to time they will respond to how the legal system reacts if and when litigation (or other legal regulation) arises. The craft of “reverse engineering” appears to have followed this model. “Reverse engineering” was established initially as fair use under the head of “research and investigation,” practices with an established pedigree. Over a relatively short period of time, “reverse engineering” claims were being brought and vindicated on their own terms, suggesting that courts have both recognized and in part created a social or cultural pattern defined as “reverse engineering” that characteristically supports claims of fair use.

There is no reason to suppose that arguments favoring critical appropriation may not follow a similar course.⁶⁴⁶ There is some evidence in the area of copyrighted music that it already has done so. “Sampling” of a popular musical recording to create a new work has been considered a matter for copyright markets following a district court injunction against an early “sampling” defendant in *Grand Upright Music v. Warner Bros.*⁶⁴⁷ The explosive success of

645. See Negativland, *Two Relationships to a Cultural Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 239, 239-40.

646. Some of those who consider themselves to be appropriationist artists may, of course, choose to avoid this strategy in order to preserve the integrity of their outsider status, and to seek legal recognition for their work in other ways. The battle against the law may be part and parcel of the artistic enterprise. Consider the perspective of the conceptual artist Christo, who endured years of zoning battles with local authorities before erecting his “Running Fence” in Sonoma County, California: “It’s hard to explain that the work is not only the fabric, steel poles, or Fence. Everybody here [at the zoning hearing] is part of my work. Even those who don’t want to be are part of my work....” Milner S. Ball, *Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf*, 12 ENVTL. L. 623, 656 (1982).

647. 780 F. Supp. 182 (S.D.N.Y. 1991). Institutionalization of “sampling” licenses is

“sampling”-based popular music, and the fact that unauthorized sampling has thrived notwithstanding industry practice,⁶⁴⁸ suggests that the time is ripe for legal acknowledgment of a sampling pattern. In fact, the Ninth Circuit recently did reject an infringement claim against a “sampling” defendant on what amounted to a fairness argument,⁶⁴⁹ suggesting, importantly, that the pattern-oriented approach may be predictive of the evolution of patterns, as well as reactive.

In the absence of such a pattern-related argument, fair use claims on behalf of individual “appropriators” or mere “personal” or “private” users ought ordinarily to fail. The case most commonly cited in support of a “personal” or “private” right to use a copyrighted work is *Sony*, and as I have suggested above, that case is best understood in pattern-oriented terms than in terms of the interests of the “time-shifting” VTR users. Why this result may be the right one in copyright terms generally is, among other things, the topic of the next and final Part.

V. THE PURPOSES OF PATTERNS

To this point this Article has argued that a pattern-oriented approach is a descriptively appropriate method of unifying fair use decision making. This Part takes up the counterpart argument that this approach is one that courts ought to pursue, given our understanding of the policy purposes of copyright law. It does so by departing from conventional economic accounts of the welfare-maximizing structures of copyright.⁶⁵⁰ (One could justify the pattern-oriented approach within a market framework. Economists have concluded that structured sharing arrangements, particularly those characterized by formal and informal mechanisms that police the limits of the structure, can be part of a welfare-maximizing de-

reflected in practitioner literature. See, e.g., Donald E. Biederman et al., *Counseling Clients in the Entertainment Industry: Music Publishing*, 648 PLI/PAT (Practicing Law Institute March-April 2001).

648. See Roberta Guger, *The Mash-up Revolution* (Aug. 9, 2003), available at http://www.salon.com/ent/music/feature/2003/08/09/mashups_cruger/index_np.html.

649. See *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003) (characterizing defendants’ sampling as “de minimis” and therefore excused).

650. See *supra* notes 157-62 and accompanying text.

sign.)⁶⁵¹ Instead, here I suggest that it is possible that in an instrumental sense that relies informally on copyright policy rather than on an economist's formal "welfare" construct, patterns are likely to give society precisely what it needs, in copyright terms, and precisely what it is likely not to get from copyright markets alone. Relying on contemporary research and theory in sociology, anthropology, and cognitive psychology, I suggest that creativity and creative

651. In legal terms, the four factors of the fair use statute would serve as a device for bypassing direct, difficult questions of efficient markets in favor of an apparently neutral and administrable proxy. Elena Kagan has proposed a related approach under First Amendment doctrine. *Cf.* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 441 (1996) (characterizing levels of scrutiny as an analytic technique that enables courts to avoid inquiry into governmental motive in First Amendment cases).

The direct economic case has been made with respect to tangible goods. *See* Steven N. S. Cheung, *Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements*, 12 J.L. & ECON. 23, 26-27 (1969); Joseph E. Stiglitz, *Incentives and Risk Sharing in Sharecropping*, 41 REV. ECON. STUD. 219, 219-21 (1974); *see also* Douglas W. Allen & Dean Lueck, *The Role of Risk in Contract Choice*, 15 J.L. ECON. & ORG. 704, 724-25 (1999); Douglas W. Allen & Dean Lueck, *Transaction Costs and the Design of Cropshare Contracts*, 24 RAND J. ECON. 78, 79-80 (1993); Douglas W. Allen & Dean Lueck, *The "Back Forty" on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts*, 8 J.L. ECON. & ORG. 366, 367-68, 370 (1992); David M.G. Newbery, *Risk Sharing, Sharecropping and Uncertain Labour Markets*, 44 REV. ECON. STUD. 585 (1977); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1341-44, 1392-93 (1993) (arguing that common property regimes operate to reduce risk by pooling access to resources). Cheung and Stiglitz argue that cropshare contracts are used to avoid moral hazard problems that arise between landowners and farmers or laborers; Allen and Lueck argue that such contracts can increase social welfare because transactions costs in monitoring compliance are low.

Parallel research confirms the potential optimality of "sharing" structures in intangible property, such as information goods. *See* Hal R. Varian, *Buying, Sharing and Renting Information Goods*, 48 J. INDUS. ECON. 473, 473, 475 (2000) (building on Stanley M. Besen & Sheila Nataraj Kirby, *Private Copying, Appropriability, and Optimal Copying Royalties*, 32 J.L. & ECON. 255, 256-57 (1989)); *see also* Yannis Bakos et al., *Shared Information Goods*, 42 J.L. & ECON. 117, 123 (1999); Darlene C. Chisholm, *Profit-Sharing Versus Fixed-Payment Contracts: Evidence From the Motion Pictures Industry*, 13 J.L. ECON. & ORG. 169 (1997); Lunney, *supra* note 5, at 862-68 (arguing that private copying of copyrighted works could not be offset by increased prices but would deprive copyright owners only of excess incentives to produce already popular works, leaving copyright owners still able to optimize profits); Meurer, *supra* note 160, at 138; Meurer, *supra* note 169, at 851, 876-77 (concluding that technological and legal changes mean that positive effects on producer profits are likely to occur); Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Toward Shared Works*, 77 S. CAL. L. REV. (forthcoming 2004) (arguing that different forms of shared use may be economically efficient depending on the extent to which those forms affect the demand curve for the information product). *But see* Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. (forthcoming 2004) (criticizing economic analysis of benefits sharing that are premised in price theory).

expression may not be the direct and determinative result of the legal rules adopted, but that creativity effects are the probabilistic results of a system designed according to the patterns orientation.⁶⁵² To make the pattern-oriented approach a framework for future analysis rather than a recapitulation of categories adopted by courts, as reviewed in Part IV.B, I argue that it is the concept of the pattern itself that is a principal concern, rather than the particular patterns identified to date.

As an initial matter, scholars appear to agree, from a variety of perspectives, that creativity as a social good is best fostered in an environment populated by structured social groups. Wendy Gordon recently made explicit the possible connections among creativity, gifts and sharing, and a group or community orientation. "Shareable goods are a traditional source of binding groups together: not only standard 'public goods' such as highways and defense, but also folk tales, art, songs, and symphonies."⁶⁵³ It may be the case, however, that the community (that is, the pattern) sponsors the creativity, rather than the other way around, or at least that the relationship between the two is bidirectional and that each reinforces the other. The research is more suggestive than conclusive, and it is not (either in my presentation in this Part or within the disciplines that have produced it) tightly integrated. Overall, the material suggests that economists may be on to something when they suggest that shared social or cultural patterns are welfare enhancing. More specifically, organizing the law of fair use around a privilege for expressive processes in the context of patterns may be a sound social policy for promoting the kind of creativity that copyright law is designed to encourage. Fair use is not simply a device for declaring that copyright comes to an end; it is an affirmative argument for no copyright liability under a specified set of circumstances.

652. For specific accounts (in different contexts) of models that bridge economic and pattern-oriented concerns, see Benkler, *supra* note 424, at 369, 406-23 (discussing P2P systems of information production, such as "open source" software communities, structured by software licenses generally characterized by availability of the source code to all users, accompanied by the power to modify that code); Merges, *supra* note 157, at 1327-61 (describing emergence of collective rights organizations in intellectual property environments to reduce transactions costs in repeat-play environments).

653. Wendy J. Gordon, *Intellectual Property*, in OXFORD HANDBOOK OF LEGAL STUDIES 617, 644 (Peter Cane & Mark Tushnet eds., 2003).

A. The Importance of Patterns and Social Networks

Scholars looking at the sociology of science and its implications for patent law have recognized, if anecdotally, that the optimal organization of scientific research consists of independent communities of researchers working with knowledge of one another's activities.⁶⁵⁴ Welfare costs from duplicative research are more than offset by correction of mistakes, confirmation of research results, and differential analyses of common data, leading to better syntheses. Culture, in short, is constructed of patterns and networks.

The model—that cultural production is best understood at the level of coordinated social practices—has been formalized, for scientific communities at least. Robert Merton famously described “science” according to its norms of public information disclosure and exchange.⁶⁵⁵ His perspective has been updated recently by Stephen Hilgartner and Sherry Brandt-Rauf as the “datastream” model of scientific exchange,⁶⁵⁶ which considers “data” not as objects subject to formalized processes of development and exchange, but as elements of evolving data streams, information embedded in the social practices of scientific communities. Data streams are characterized by evolving, heterogeneous networks of information and resources, both tangible (raw materials, instruments, written descriptions) and intangible (techniques, protocols, experience), each linked to the

654. See Eisenberg, *Exclusive Rights*, *supra* note 640, at 1061, 1063-65 (1989) (citing Michael Polanyi, *The Republic of Science: Its Political and Economic Theory*, 1 MINERVA 54, 56 (1962) and the various works of Robert K. Merton and Warren O. Hagstrom).

655. Merton argued that science is characterized by a normative commitment to producing knowledge as the common resource for the scientific community. See MERTON, *supra* note 640, at 270, 274-75. Hagstrom refined Merton's model using a “gift/exchange” framework for scientific research, in which scientific research was contributed to the community in exchange for nonmonetary recognition. See WARREN O. HAGSTROM, *THE SCIENTIFIC COMMUNITY* 13-14 (1965).

656. See Stephen Hilgartner & Sherry Brandt-Rauf, *Data Access, Ownership, and Control: Toward Empirical Studies of Access Practices*, 15 KNOWLEDGE 355 (1994). Thomas Mandeville has offered an economic model of scientific research characterized by a similar process orientation. See THOMAS MANDEVILLE, *UNDERSTANDING NOVELTY: INFORMATION, TECHNOLOGICAL CHANGE, AND THE PATENT SYSTEM* (1996). An organizational model of information exchange to the same effect is presented in JOHN SEELY BROWN & PAUL DUGUID, *THE SOCIAL LIFE OF INFORMATION* 91-111 (2000) (emphasizing the importance of institutional practice, in addition to formal process, in understanding the meaning of information) and John Seely Brown & Paul Duguid, *Knowledge and Organization: A Social-Practice Perspective*, 12 ORG. SCI. 198, 198-213 (2001).

others. Elements of these networks range from the ordinary to the specialized, novel, or scarce; from the reliable and valuable to the uncertain and even incredible; from the stable to the contingent. Interactions with these streams are not limited to an “upstream researcher/downstream researcher” paradigm but instead occur in the context of research networks of a range of individual actors and institutions, with different levels of training, involvement, and interest, which both define and are defined by their information access practices. The overall point of the model is that in drawing distinctions between rules for open access and rules for controlled access to scientific information, it is necessary to understand in detail the structure of these data streams and the networks in which they are embedded. The right level of analysis is not the data “object” but instead the stream as a whole.⁶⁵⁷

Comparable arguments are seen in other cultural contexts. It is argued that culture, as a whole, is produced not only by individuals working alone, but by groups of people, working and interacting in the context of practices defined by institutions and networks.⁶⁵⁸ The concept of the gift, for example, was originally described as based not on generosity, but as an exercise of power and influence in social context, that is, as a mechanism for the reproduction and perpetua-

657. With respect to legal rules applied to scientific research, Hilgartner suggests that the scientific enterprise would be better served by legal regimes that address these processes instead of focusing so exclusively on the end-products of research. See Hilgartner & Brandt-Rauf, *supra* note 656, at 366-69. Cf. Robert P. Merges, *Property Rights Theory and the Commons: The Case of Scientific Research*, 13 SOC. PHIL. & POL'Y at 145 (1996) (suggesting that experimental use doctrine in patent law be conceived as a boundary for the activity of small, synergistic groups). To the extent that the datastream model captures “small science” rather than “big science” practiced in large, formal organizations, a more complex legal regime may be appropriate. See J. H. Reichman & Paul F. Uhler, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, 66 LAW & CONTEMP. PROBS. 315, 322-23 (2003).

658. See DiMaggio, *supra* note 457, at 283 (describing networks as crucial environments for the activation of cognitive schemas); Friedland & Alford, *supra* note 457, at 232. The relevant actor may be not the individual, but instead a particular identity constructed by an individual for purposes of participating in a given network. See HARRISON C. WHITE, *IDENTITY AND CONTROL: A STRUCTURAL THEORY OF SOCIAL ACTION* 5-9 (1992). White describes a social network as a network of meanings, created by narratives that individuals use to structure the connections between identities in a given social structure. See *id.* at 65-67. The focus on identity and narrative enables a given individual to participate in multiple networks, and to adapt identities and switch from network to network as needs arise. See *supra* note 501 and accompanying text (describing connection between narrative construction and patterns).

tion of social structures.⁶⁵⁹ Gift-giving and reciprocity are now more typically understood both as contributing to the stability of social patterns and as patterns in themselves.⁶⁶⁰ Carol Rose notes:

In whatever ways creative communities may be organized, the point remains that in many intellectual and artistic endeavors, creativity may be synergistic less with the world at large than with communities of other artists, creators, and contributors.⁶⁶¹

To the extent that copyright's concerns with "creativity" and "progress" are linked to the evolution of culture more broadly,⁶⁶² the law's focus on patterns of an activity—the journalism of reporters and the scholarship of scholars, for example, rather than "ordinary" or "private" use by an individual—seems apt.

B. The Emergence of Creativity

One wonders, nonetheless, precisely how or why such patterns may be connected to creativity or creative expression. Individuals are "creative," in conventional understanding; if "creativity" is associated with patterns or groups, it is because those patterns are oriented toward creativity and attract or reinforce individual creative behavior. The classic model is based on the notions of internalization (in which the norms and processes of the groups are imprinted on the individual) and externalization (in which the individual's preferences influence the distinct social structure of which the individual is a part).⁶⁶³ A modern variant is the structuration thesis of

659. See MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (Ian Cunnison trans. 1954). This view comes with a cost, which is the risk that the power relationship may be illegitimate. The evolution of patterns mitigates the risk, though perhaps not entirely. See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 42 (1998) (describing the role of intellectual property law in stifling alternative cultural visions); Rose, *supra* note 625, at 107 (noting risk that custom and community norms can be "hierarchical, xenophobic, and backward-looking").

660. See Gouldner, *supra* note 447, at 163-64, 172.

661. Rose, *supra* note 625, at 107.

662. See *id.* at 106-08 (noting importance of social structures in constraining synergism that finds expression in the commons, to avoid dissipation of its value).

663. The model is associated with Lev Vygotsky. See also JAAN VALSINER, *THE GUIDED MIND: A SOCIOGENETIC APPROACH TO PERSONALITY* (1998).

Anthony Giddens, noted above.⁶⁶⁴ The pattern-oriented approach suggests the importance of patterns as such, whether or not each pattern is deemed to be “productive” or “creative,” and whether or not individual participants can claim the status of a “creator.”⁶⁶⁵ More recent work, related to research on situated social practices,⁶⁶⁶ proposes an alternative “emergentist” framework for understanding the individual/social connection, in which both individual and social forms remain significant, but their influence on one another and the ultimate shape of the culture thereby produced evolves over time in a dynamic rather than deterministic way.⁶⁶⁷ Importantly, the notion of “emergence” is closely tied not only to understanding connections between individual and social development generally, but more specifically to the development of “creativity.” From research on patterns and practice and its connection to cognitive structures, in this Part, I attempt briefly to connect these broad inquiries into the character of society and culture to the more specific and relevant question of creativity and, ultimately, to copyright law.

An earlier framework for inquiry into the nature of creativity situated creative expression primarily in the creative or gifted individual, and characterized creative activity as the act conceptually of breaking out of one frame of reference and entering another. Creativity was characterized as transcending a boundary of some sort,⁶⁶⁸ a sort of “a-ha!” phenomenon in which distinctions between old and new, inside and outside, individual and domain, person and product, and so forth, were relatively clear.⁶⁶⁹

664. See *supra* note 496 and accompanying text.

665. See Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1527, 1549-51 (2000) (noting the importance of groups as groups, and beyond the reward structures they provide for individuals). Cf. Albert Bandura, *SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY* (1986) (theorizing that groups are effective as models for individual behavior).

666. See, e.g., EDWIN HUTCHINS, *COGNITION IN THE WILD* (1995); Gavriel Salomon, *No Distribution Without Individuals' Cognition*, in *DISTRIBUTED COGNITIONS: PSYCHOLOGICAL AND EDUCATIONAL CONSIDERATIONS* 111 (G. Salomon ed., 1993).

667. The notion of “emergence” in social and evolutionary development goes back to the late nineteenth century. Its application to cultural phenomena is far more recent, and therefore undeveloped.

668. See, e.g., David N. Perkins, *The Possibility of Invention*, in *THE NATURE OF CREATIVITY: CONTEMPORARY PSYCHOLOGICAL PERSPECTIVES* 362-85 (Robert J. Sternberg ed., 1988).

669. Much of the existing structure of copyright law reflects this kind of dualism.

The pattern-oriented perspective, by contrast, recasts creativity as an emergent property of a complex system. Given a group, or pattern, or system of some sort, which is not purely homogeneous but which is characterized by a relevant set of sociocultural rules or constraints (such as context, conventions of a domain, and representation or internalization of that domain in the individual), novelty or creative production is the probabilistic—though not necessary—result.⁶⁷⁰ It is a process-oriented view, that creativity inheres in the increased number of interconnections that arise in such a context, to be contrasted with the older product-oriented view, the comparison of old and new.

The emergentist approach relies in part on broader interest in exploring the properties of complex systems. These collections of decentralized, evolutionary phenomena are ordered roughly by properties that cannot be captured by descriptions of their constituent parts, which produce complex structures over long periods of time via the interaction, uncoordinated events and actions.⁶⁷¹ It is characteristic of an “emergent” system that its properties cannot be predicted completely by analyses of the properties of its constituent parts; instead, the system is characterized probabilistically.⁶⁷²

670. See Jerome S. Bruner, *The Conditions of Creativity*, in JEROME SEYMOUR BRUNER, *BEYOND THE INFORMATION GIVEN: STUDIES IN THE PSYCHOLOGY OF KNOWING* 208, 209 (Jeremy M. Anglin ed., 1973) (describing the connectionist phenomena represented here as “effective surprise”); MIHALYI CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* (1996); GEORGE H. MEAD, *MIND, SELF & SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (1934) (describing “the emergence of the novel” from social patterns); Ben W. Dalton, *Creativity, Habit and the Products of Creative Action: Revising Joas, Incorporating Bourdieu*, in *SOC. THEORY* (forthcoming 2004) (arguing, following Joas’ *Creativity of Action* (1996), that Bourdieu’s concept of *habitus* implies that creativity can be redefined as the adaptation of habitual practices to specific contexts of action, and in so doing calls attention to patterns of creative activity by individuals); Kevin N. Dunbar, *How Scientists Think: On-Line Creativity and Conceptual Change in Science*, in *CREATIVE THOUGHT: AN INVESTIGATION OF CONCEPTUAL STRUCTURES AND PROCESSES* 461 (Thomas B. Ward et al. eds., 1997); R. Keith Sawyer, *The Emergence of Creativity*, 12 *PHIL. PSYCHOL.* 447 (1999) (describing novelty as a necessary property of complex emergent systems); R. Keith Sawyer, *Introduction*, in *CREATIVITY AND DEVELOPMENT* (R. Keith Sawyer ed., 2003) (describing role of artifacts and domains in mediating dynamic relationship between individual and social processes); Dean Keith Simonton, *Creativity: Cognitive, Personal, Developmental, and Social Aspects*, 55 *AM. PSYCHOLOGIST* 151-58 (2000).

671. See generally JOHN H. HOLLAND, *HIDDEN ORDER: HOW ADAPTATION BUILDS COMPLEXITY* (1995). The best popular work describing the theories and properties of complex adaptive systems is JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987).

672. For a practical description and application of complexity theory and its probabilistic

Examples at levels far grander than copyright law and creative expression include the laws of thermodynamics, evolution by natural selection, and evolutionary game theory. At the relatively simple level at which the approach is represented here, social and cultural patterns can be used to define the contours of complex social systems that are probabilistically situated to produce creative expression.⁶⁷³ If one favors such patterns in the law of fair use, then it is likely that the creativity anticipated by the law will emerge.

The emergentist approach likewise relies in part on the sociology of Bourdieu and others, to which my discussion of patterns in the law initially referred.⁶⁷⁴ In some respects, Bourdieu himself appears to lack the attention to the evolutionary processes that underlie the "emergence" of creativity as described in this Part, and his theory does not directly address precisely how the individual and the group connect to one another. But in other respects, his work and that of creativity researchers working in this vein strongly echo that of the complex systems perspective. Individuals who are part of diverse, autonomous, motivated, cohesive groups with a common purpose over time, that is, who share and appreciate a *habitus*, in Bourdieu's terms, are likely to be creative.

A person who wants to make a creative contribution not only must work within a creative system but must also reproduce that system within his or her mind. In other words, the person must learn the rules and content of the domain, as well as the criteria of selection, the preferences of the field.⁶⁷⁵

dimensions to legal theory, see J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996). For an adaptation to decision-making processes involving the legal system, see David G. Post & David R. Johnson, "Chaos Prevailing on Every Continent": *Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT. L. REV. 1055, 1083-93 (1998).

673. The patterns described in Part IV.B.2, *supra*, consist in part of these sorts of systems. I offer one additional example of how reverse engineering by computer scientists may, according to those researchers themselves, produce unexpectedly creative or novel results. See Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501, 509-12, 514-16 (2003) (describing scientists' criticism of Digital Millennium Copyright Act controls on certain computer science research). The weblog of computer scientist Edward Felten is emblematic of the concern; it is titled "Freedom to Tinker." See <http://www.freedomtotinker.com> (last visited Jan. 11, 2004).

674. See *supra* notes 454-56 and accompanying text.

675. CSIKSZENTMIHALYI, *supra* note 670, at 47.

This perspective brings this Part full circle. It calls to mind the description of the “datastream” model for scientific research with which the Part introduced its description of the importance of patterns. The *habitus*, as understood by members of the field, supplies the formal and informal rules and frameworks of the discipline. The learning and training of its members supplies the ability to make connections between previously unconnected phenomena, and to recognize differences between such connected phenomena and what existed before.⁶⁷⁶ It is creative output of this kind that the copyright system is designed to encourage,⁶⁷⁷ and it is this sort of creative output that is captured by the pattern-oriented approach to fair use.

* * *

It should be clear that the social cognition analysis of the utility derived from patterns is incomplete. How, for example, do some practices and conventions rise to the level of patterns, and others remain tentative and ever-changing?⁶⁷⁸ The prescriptive case for the pattern-oriented approach to fair use must be characterized as more tentative than conclusive. The “emergentist” theory of creativity is in its formative stages within the social sciences themselves, and much remains to be learned in those domains, as well as in the possible application of the theory to law. As an explanation of *why* we should attend to a pattern-oriented approach to fair use, or to

676. See SHARON BAILIN, *ACHIEVING EXTRAORDINARY ENDS: AN ESSAY ON CREATIVITY* 66-67 (1988); TONY BASTICK, *INTUITION: HOW WE THINK AND ACT* 215 (1982) (describing intuition as nonlinear parallel processing of global multi-categorized information).

677. See *supra* notes 88-90 and accompanying text. I leave implicit the corollary that the character of the creativity produced by the functioning of markets in copyrighted works may turn out not to be the kind of creativity that the copyright system intends to produce.

678. One suggestion comes from Mary Douglas, in *HOW INSTITUTIONS THINK* 112 (1986) (arguing that institutions develop legitimacy via “naturalizing analogies”). This process calls to mind the description above of the validation of reverse engineering. See *supra* notes 572-83 and accompanying text. See also Kathleen M. Carley, *On the Evolution of Social and Organizational Networks*, 16 *RES. IN THE SOC. OF ORG.*, 3-30 (David Knoke & Steven Andrew eds., 1999) (describing model of socio-cognition in which knowledge networks (who knows what information, and what information is related to what), cognitive social structures (who knows whom), and individual cognitive networks (what each individual knows) co-evolve); Tom R. Burns & Thomas Dietz, *Cultural Evolution: Social Rule Systems and Human Agency*, 7 *INT'L SOC.* 259 (1992) (proposing neo-Darwinist evolutionary model of cultural and institutional change).

other copyright problems, it appears to be a credible, if provocative, starting point in fields (both copyright generally and fair use in particular) that historically have lacked much in the way of coherence in their relationship with society and culture.

CONCLUSION

Prompted by discomfort over judicial treatment of claims that file sharing of digital musical works constitutes fair use, and more generally by the uncertain relationship in fair use between the individual defendant and the social practice the defendant arguably represents, this Article has attempted to address the problem of file sharing by situating the fair use argument about that practice more broadly in the context of the uncertain relationship between the law of fair use and contemporary social science. It has argued that existing theories of the doctrine of fair use, and applications of the doctrine in the leading cases, have failed to recognize properly the role of social and cultural patterns, and how individual defendants participate in (or fail to participate in) those patterns. As a result, the doctrine in its current form has a needlessly arid tone, leading to fair use decisions unpredictably based solely on the four statutory factors listed in § 107 of the Copyright Act. Taking pattern analysis from its current position at the margins of fair use and placing it at the forefront creates the potential for unifying application of the doctrine while preserving a robust fair use zone. That approach is justified in terms of the language of the statute and the history of the doctrine, is consistent with the pattern of fair use cases decided at least since enactment of § 107, and most important, is supported by preliminary cognitive science research that suggests that focusing on and privileging social and cultural patterns may be a reliable way of ensuring the production of creative expression that complements creativity fostered by market mechanisms.

To some, it will appear that courts are engaged in elaborate post-hoc rationalizations of the behavior of seemingly deserving defendants, and that a pattern-oriented approach merely lends legitimacy to the stories that lawyers tell to exonerate their clients. There is no way thoroughly to rebut this charge, except to adopt some or all of the proposals I suggest and to see whether and how they affect both copyright litigation and judicial reasoning. In the end, it may turn

out that the criticism is correct (though I have argued at length that it is not)—but at the very least, the approach offers these storytellers and their audiences a positive framework for structuring the domain of fair use, instead of a negative framework for repelling the domain of copyright. That is a benefit that ought not be overlooked.

Whether or not the approach proves its worth in full, implicit throughout is the suggestion that pattern-oriented analysis may have broader applicability to copyright law (and perhaps to the law beyond) than merely to the fair use doctrine. This is particularly important in light of my conclusion that fair use may not be an appropriate tool for protecting ostensibly “personal” or “private” use. Other doctrines may serve such interests more effectively.

For example, the doctrines of contributory and vicarious copyright infringement played a central role in decisions to enjoin operation of file sharing systems operated by Napster and by Aimster. As I have described the Supreme Court’s decision in *Sony v. Universal City Studios*, that decision used what might be characterized as the inverse of a pattern-oriented approach in order to determine that the defendant’s conduct was purely market-oriented with respect to VTRs, and therefore not within the reach of copyright. Both doctrines of secondary liability may profit from more explicit recognition of social and cultural context in defining markets for things and machines, as well as in recognizing patterns with respect to expressive works.

“First sale” as a defense to a claim of unauthorized infringement via distribution of a copyrighted work⁶⁷⁹ is worth exploring in the same way. The distinction between the right and the object has been a central feature of copyright since the first copyright statute, the Statute of Anne.⁶⁸⁰ In a world where the phrase “tangible medium of expression” truly means a medium that can be grasped in one’s hand, this dualism is not especially troubling. Sharing a book with a friend or family member does not necessarily implicate any important copyright interests. In an electronic age, an equivalent act performed with a computer file may trigger a criminal investigation.⁶⁸¹

679. See 17 U.S.C. § 109(a) (2000).

680. See Madison, *Complexity*, *supra* note 18, at 138-41; *supra* note 24 and accompanying text (describing origins of copyright’s concern with the “copy”).

681. See *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (refusing to

In copyright law, what are the privileges of ownership, or, to put the question as others have put it, how, if at all, should the rationale for permitting the traditional form of sharing a tangible object be applied in this different context?⁶⁸² Courts use the fiction of declaring that electronic “copies” of copyrighted works have been made or distributed in order to remedy what they perceive as unwarranted economic injury.⁶⁸³ A better analytic method might ask whether the distribution dynamic in question, be it “file sharing” or some other process, is part and parcel of some recognized social pattern. The court in *A & M Records v. Napster* may have been taking this position by concluding that Napster users were not “sharing” music in the way that compact discs may be shared. When Napster users retained “copies” of the plaintiffs’ works, distribution of the new “copies” took them beyond the limits of first sale: “Both [*Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*]⁶⁸⁴ and [*Sony Corp. of America v. Universal City Studios, Inc.*]⁶⁸⁵ are inapposite because the methods of shifting in those cases did not also simultaneously involve distribution of the copyrighted material to the general public.”⁶⁸⁶ As a matter of the law of distribution rights, placing the emphasis more directly on the processes and patterns in which Napster users engaged would make the opinion resonate more strongly with practice and, in the end, make it a more credible statement of the law.

A third sense in which the patterns approach might be used in the file sharing controversy is the idea/expression foundation of all of copyright. In part, Napster was prosecuted for distributing not copyrighted works themselves, but information about those works.⁶⁸⁷ Courts must distinguish between the “idea” of a work and its protected “expression”—but how? Judge Hand’s “abstractions”

dismiss an indictment under the Digital Millennium Copyright for “trafficking” in technology used to circumvent controls on electronic books).

682. See Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13 (2003) (urging instantiation of norms of library use in copyright law).

683. Wendy Gordon has called this phenomenon “the restitutionary impulse.” See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992).

684. 180 F.3d 1072 (9th Cir. 1999).

685. 464 U.S. 417 (1984).

686. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001).

687. See *id.* at 1011-12 (describing information-indexing function of Napster’s servers).

standard,⁶⁸⁸ the most famous (if still unclear) analytic tool in this area, explicitly invokes the “patterns” concept on which the present fair use proposal is based, a linguistic coincidence that bears further exploration. That is, it may be that the difficult task of distinguishing idea from expression, if coherent at all, should depend less on intrinsic “idea” and “expression” attributes of a given work, and more on how patterns of different sorts treat different elements of works and the processes that contribute to them.

Whether a pattern-oriented approach can succeed in rationalizing these or any other domains of copyright law remains for further investigation.⁶⁸⁹ For now, and for fair use, the time seems right to acknowledge that the more than a century-long experiment with the open-ended “four factor” fair use framework is ripe for conclusion, and for transition to an analytic approach that can guide both law and conduct with acceptable measures of fairness and predictability.

688. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930):

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out.... [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.

689. Other questions remain, with respect to fair use itself. What should the roles of judge and jury be in evaluating fair use claims? Cf. Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407 (1999) (describing tension in American law between judge and jury as sources of normative judgments in law). Is the pattern-oriented approach consistent with international obligations? Cf. Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 *COLUM. J. TRANSNAT'L L.* 75, 114-23 (2000) (noting possible conflict between § 107 and Article 9(2) of the Berne Convention). What bearing, if any, does a pattern-oriented interpretation of fair use have on whether fair use interests can be trumped by private agreement? See *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Fed. Cir.), cert. denied, 123 S. Ct. 2588 (2003) (finding that “no reverse engineering” clause in shrinkwrap agreement was enforceable).